Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

In Re ANDREW LEE MITCHELL

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT PROHIBITS RETRIAL OF A DEFENDANT AFTER REVERSAL OF HIS CONVICTION FOR SUPPRESSION OF MATERIAL, EXCULPATORY EVIDENCE, WHEN THE PROSECUTOR INTENTIONALLY SUPPRESSED THE EVIDENCE IN ORDER TO PREVENT AN ACQUITTAL THAT THE PROSECUTOR BELIEVED AT THE TIME WAS LIKELY TO OCCUR IN THE ABSENCE OF HIS MISCONDUCT?

2.

WHETHER PRETRIAL DOUBLE JEOPARDY LEGAL SUFFICIENCY REVIEW UNDER *ABNEY V. UNITED STATES*, 431 U.S. 651 (1977), *BURKS V. UNITED STATES*, 437 U.S. 1 (1978), AND *LOCKHART V. NELSON*, 488 U.S. 33 (1988), IS REQUIRED WHEN A DEFENDANT MAKES A COLORABLE SHOWING THAT PROSECUTORIAL MISCONDUCT LED TO HIS PRIOR CONVICTION ON LEGALLY INSUFFICIENT EVIDENCE?

INTERESTED PARTIES

1. Andrew Mitchell, Tyler, Texas, Petitioner.

2. Jack Skeen, Smith County District Attorney, Tyler, Texas, Respondent.

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OPINIONS BELOW

Petitioner, Andrew Lee Mitchell, was indicted in January 1980 in the 241st Judicial District Court, Smith County, Texas, for the capital murder of Keith Wills. Bail was granted by the Texas Court of Criminal Appeals upon a finding that there was no "evident" proof of Petitioner's guilt. *Ex parte Mitchell*, 601 S.W.2d 376 (Tex. Crim. App. 1980). Petitioner was convicted of the offense in February 1981, and sentenced to death. The Court of Criminal Appeals affirmed Petitioner's conviction on direct appeal. *Mitchell v. State*, 650 S.W.2d 801 (Tex. Crim. App.), *cert. denied*, 464 U.S. 1073 (1984). In 1993, however, the Court granted relief in Petitioner's state writ of habeas corpus, vacated the conviction, and remanded the case due to the State's suppression of exculpatory evidence that undermined confidence in the outcome of the original trial. *Ex parte Mitchell*, 853 S.W.2d 1 (Tex. Crim. App.), *cert. denied*, 510 U.S. 864 (1993) (8-0 opinion).[1] *See* **Appendix C.**

On July 14, 1993, Petitioner was released on a $75,000 surety bond. In February 1995, Petitioner filed a civil suit against Smith County and several individual defendants for millions of dollars alleging that his twelve year incarceration under a sentence of death was due to the wrongful conduct of Smith County and its agents. That suit is still pending. Immediately after the suit was filed, the Smith County District Attorney's Office announced that it was beginning re-investigation of Petitioner with the purpose of taking him back to trial for the capital murder charge. This "re-investigation" appears to have consisted primarily of contacting the two "accomplice" witnesses,

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[1] Judge Maloney, a former law partner of undersigned counsel, abstained from an otherwise unanimous opinion.

one of whom has recanted his trial testimony, and two other witnesses who supplied no new information.

Petitioner's case was transferred from the 241st Judicial District Court to the 114th Judicial District in April 1996, and the judge of the 114th District Court, Hon. Cynthia Stevens Kent, immediately set the case for retrial. Petitioner filed a pretrial petition for writ of habeas corpus urging that: 1) retrial should be barred under the federal and state double jeopardy clauses because the State engaged in intentional misconduct; 2) retrial should be barred under the federal and state double jeopardy clauses because the evidence against Petitioner was (and is) legally insufficient; and 3) retrial should be barred under the federal Due Process Clause and state Due Course of Law Clauses because the State engaged in intentional misconduct in the investigation and trial.

Judge Kent conducted a hearing on the petition on July 9-11, 1996. Facts were adduced at the hearing which demonstrated that the lead trial prosecutor, Michael Patterson, purposefully suppressed part, if not all, of the evidence that led to the reversal of Petitioner's conviction. At the close of the 1996 hearing, Judge Kent granted the writ and, without making any findings of fact or conclusions of law, denied Petitioner's requested relief and his oral motion for a stay pending interlocutory appeal to the Twelfth Court of Appeals in Tyler.

Petitioner timely filed a notice of appeal and, on August 8, 1996, the Texas Twelfth Court of Appeals stayed the trial court's proceedings while it considered the merits of Petitioner's double jeopardy appeal under *Abney v. United States*, 431 U.S. 651 (1977). The Twelfth Court of Appeals denied Petitioner relief on the merits on September 11, 1996. *Mitchell v. State*, 963 S.W.2d 532 (Tex. App. [Tyler] 1996). *See* **Appendix B.** On the same date, the

Texas Court of Criminal Appeals responded to an application filed by Petitioner for writs of mandamus and prohibition by staying "all proceedings" in the trial court "pending further orders."

Petitioner timely sought discretionary review of the Twelfth Court of Appeals' decision, which was granted by the Court of Criminal Appeals on January 29, 1997. On November 19, 1997, the Court issued the opinion denying merits relief for which Petitioner seeks this Court's review. *Ex parte Mitchell*, 1997 Tex. Crim. App. LEXIS 92 (Tex. Crim. App. 1997). *See* **Appendix A.** Petitioner moved the Court for rehearing, in part,[2] because the Court had addressed only the first two of the six grounds that were accepted for review (*see supra*). On April 15, 1998, the Court denied the motion for rehearing. *Ex parte Mitchell*, 1998 Tex. Crim. App. LEXIS 50 (Tex. Crim. App. 1998). *See* **Appendix D.** One judge wrote a concurring opinion to the denial of rehearing, arguing that the Court's grant of all six grounds for review on its "hand down" sheet was a clerical error. *Id.* (Price, J., concurring). Another judge, however, wrote a dissent to the denial of rehearing, stating that all six grounds had been accepted for review without limitation, that the case "shuck" indicated that all six were accepted, and that,

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[2] Mitchell also challenged the Court's legal interpretation and pointed out that the Court majority misstated the law and rewrote the facts that, otherwise, had been conclusively found by the 1993 Court, so as to support denial of relief. Concurring Judge Meyers also characterized the majority's opinion as legally "befuddling" and "puzzling." *Ex parte Mitchell*, 1997 Tex. Crim. App. LEXIS 92, *20 & *20 n.1 (Meyers, J., concurring). Judge Meyers objected that the majority confused double jeopardy and due process concerns and relied upon cases that had "nothing to say about the issue . . . of double jeopardy." *Id.* at *20 n.1 (citations omitted).

indeed, both parties briefed all six. *Id.* (Baird, J., dissenting).

JURISDICTION

The Texas Court of Criminal Appeals had jurisdiction under Article 44.45, Texas Code of Criminal Procedure. This Court has certiorari jurisdiction under 28 U.S.C. § 1257 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 38.14, Texas Code of Criminal Procedure (1979)

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

STATEMENT OF THE CASE

The intentional suppression of material exculpatory evidence by the Smith County District Attorney's Office which undergirded the Texas Court of Criminal Appeals' reversal of Petitioner's conviction for capital murder was

the kind of prosecutorial misconduct that should trigger the preclusive effects of the Fifth Amendment Double Jeopardy Clause. *Oregon v. Kennedy*, 456 U.S. 667 (1982); *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992), *cert. denied*, 508 U.S. 939 (1993) (setting a standard for post-reversal relief preserving the balance of interests underlying the mistrial standard in *Oregon v. Kennedy*).

In a unanimous opinion, the Texas Court of Criminal Appeals vacated Petitioner's conviction in 1993 because the State suppressed material exculpatory evidence which exonerated Petitioner and undermined confidence in the verdict creating a reasonable doubt that did not otherwise exist. *Ex parte Mitchell*, 853 S.W.2d 1 (Tex. Crim. App.), *cert. denied*, 510 U.S. 864 (1993). The suppressed material exculpatory evidence consisted of statements by Game Warden Ralph East and Smith County Deputy Sheriff Kelly Stroud, who independently reported to Smith County Sheriff's Office investigators that they saw the victim alive hours after the State's "accomplice" witnesses testified the crime occurred and also hours after the State itself proved Petitioner had joined friends for the rest of the night.

Petitioner was charged with the capital murder of Keith Wills during the course of robbing a fireworks stand Wills was operating near Troup, Texas. "Accomplice" witnesses Anthony Mitchell and Edward Owens, who initially[3] alleged that Petitioner committed the

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[3] Anthony Mitchell, aka Mustafa Shabazz, has recanted his trial testimony as perjured and coerced. Anthony Mitchell now asserts that the crime occurred much later (consistent with the suppressed observations and reports of East and Stroud) and that Petitioner had no involvement in the crime. Anthony Mitchell claims that he and Owens borrowed the keys to Petitioner's vehicle while Petitioner was laid up in a room at the Alfreda Hotel and that he (Anthony Mitchell) and Owens travelled back to the fireworks stand to rob and kill Wills.

offense with them, were granted leniency in return for their testimony. Anthony Mitchell received a ten-year probated sentence and Owens was granted total immunity. The State's theory at trial was that the murder occurred at approximately 8:30 p.m. on December 26, 1979. *Mitchell*, 853 S.W.2d at 1. The State's evidence at trial showed that the Petitioner and the two "accomplice" witnesses arrived at the Savoy Club and Alfreda Motel at approximately 10:00 p.m. and that Petitioner remained there the rest of the night and into the next morning. *Id.* at 2. However, Game Warden Ralph East testified at the 1989 state habeas hearing that he saw the victim sitting in the fireworks stand between 10:00 p.m. and midnight. *Id.* Smith County Sheriff's Deputy Kelly Stroud testified in the same hearing that he saw the victim sitting in the fireworks stand after midnight. *Id.* at 3. Given the forensic evidence[4] that the deceased was killed while in a standing position and was found dead on the ground behind the counter of the fireworks stand, the clear import was that the victim was alive when both Stroud and East saw the victim. In fact, during the 1989 habeas corpus proceedings, the State admitted that the deceased was alive and well at 12:15 a.m. on December 27, 1979. *See Ex parte Mitchell*, 853 S.W.2d at 4. It was also admitted by the State in its Motion for Rehearing to the Court of Criminal Appeals and in its Petition for Writ of Certiorari to this Court, wherein the State argued "[t]he reports that Keith Wills was still alive as late as 12:15 a.m. do not clear

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[4] There is no forensic evidence regarding the time of death. During the 1996 pretrial hearing, Smith County Sheriff's Deputy Walter Woodhull testified that the pathologist refused to perform medical tests to determine the time of death, whereas the pathologist testified that Woodhull never asked him to do any tests and that he would not have refused to do any tests.

the respondent from any connection to the death." Petition for Writ of Certiorari at page 10; *see also* State's Motion for Rehearing at 8-9 (same admission).

The Smith County Sheriff's Office did not investigate the information provided by Ralph East and Kelly Stroud or follow up on the written report completed by Kelly Stroud. Smith County Sheriff's Deputies Walter Woodhull and Chantal Woodhull testified in the 1989 habeas hearing that they informed the District Attorney's Office of these matters. *Mitchell*, 853 S.W.2d at 3-4. The Assistant District Attorneys involved in the case in 1980 and 1981 (Jim Walker and Michael Patterson) testified at that same writ hearing that the Woodhull's did not share that information with them. *Id.* at 3-4.

As of the hearings held in 1989 pursuant to the state habeas writ that led to the entry of the Court of Criminal Appeals' 1993 opinion in *Ex parte Mitchell, supra*, and as of the date of the filing of the pretrial writ of habeas corpus in the planned retrial (June 10, 1996), it appeared at least plausible that the Smith County Sheriff's Office never shared this information with the Smith County District Attorney's Office. However, facts were developed at the pretrial hearings held in July 1996 which revealed, unequivocally, that Michael Patterson, the lead trial prosecutor in 1981 at the original trial, was aware of Ralph East's observations at the time of trial. The proof was in the form of notes in Patterson's own handwriting reflecting the essence of East's observations. These notes were discovered on July 5, 1996, by the current prosecutor, David Dobbs, and delivered to Petitioner's counsel on July 8, 1996 (the day before the pretrial hearings began on July 9, 1996). They clearly and unequivocally reflect that Patterson was less than candid when he testified at the

1989 habeas hearing that he knew nothing about Ralph East's observations.[5]

The July 1996 pretrial hearings also revealed that Frank Henderson, the Smith County Assistant District Attorney who represented the State at the 1989 habeas hearing, failed to disclose to defense counsel in 1989 that he was in possession of Patterson's notes on East. The circumstances show that this failure was intentional. Mr. Henderson did turn over some of Patterson's notes: material that was separated by a page in the District Attorney's file from the suppressed East material. This was not all that Mr. Henderson failed to disclose. Assistant District Attorney David Dobbs also turned over an entire copy of the Sheriff's Office file in 1996. That file contains numerous exculpatory items that were suppressed by Mr. Henderson in 1989. They include investigative notes taken when Sheriff's Deputies Chantal Woodhull and David Mitchell asked questions at the Brass Lamp Inn (located across the street from the scene of the crime) that reflect that the deceased was probably alive well after the

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[5] Indeed, although Patterson professed in 1989 not to know about Kelly Stroud's report and not to have spoken with Ralph East about his observations (implying that he had no knowledge of East's observations), his final argument to the jury at the trial in 1981 belies that testimony:

> "If he wasn't with them, I mean if he wasn't with them, they could have brought you a relative, his friends, his wife, to say he was with me on December 26 between ***6:00 and midnight***, he wasn't with them. . . . "

5 S.F. 517. This effort by Patterson to "fade an alibi" at trial is particularly revealing in light of his suppressed notes reflecting knowledge of Ralph East's observations. The State was aware that from 9:00 p.m. onward Petitioner Mitchell had an alibi. Patterson faded an alibi **before midnight** because he had actual knowledge of East's observations and Stroud's report.

State alleged he was murdered (and well after Petitioner had an alibi). Any doubts about Mr. Henderson's state of mind with regard to the suppression of these items dissolves with the consideration of his final omission. Mr. Henderson was ordered by the habeas judge to seal and transmit a copy of the District Attorney's and Sheriff's Office's files to the Texas Court of Criminal Appeals for that Court's review. This was never done despite reminders to Mr. Henderson from the undersigned of his duty to do so.

Hunter Brush, who was the Smith County District Attorney at the time of Petitioner's trial and who participated personally in the trial, testified in 1996 that to his knowledge, the **only** evidence linking Petitioner to the crime was the testimony of the two accomplice witnesses. The uncontested objective circumstances demonstrate that lead prosecutor Michael Patterson intentionally suppressed the evidence of East's observations (and probably Stroud's as well) because he realized that if he did not suppress that evidence, the jury, properly instructed on Texas' "accomplice witness rule," would have acquitted Petitioner. *See Oregon v. Kennedy*, 456 U.S. 667, 675 (1982) (instructing that prosecutorial intent is to be discerned by inference from the objective facts and circumstances surrounding the prosecutor's actions).[6] Patterson also would have been aware that, if he disclosed Stroud's and East's statements prior to trial, the indictment against Petitioner would have been dismissed; if he disclosed the material during trial, Petitioner would have been acquitted (for no

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[6] During the July 1996 pretrial hearing, former District Attorney Hunter Brush testified that had he known of the Stroud report and East's observations, he never would have sought an indictment against Petitioner Mitchell, but rather would have pursued indictments against the alleged accomplices.

jury could have convicted him under the given facts); and, finally, if the material *ever* came to light there would be, no doubt, a reversal. This kind of *scienter* on the part of the prosecutor denying Petitioner an otherwise certain acquittal must bar his retrial.[7]

SUMMARY OF THE ARGUMENT

First Question Presented – Covert Intentional Misconduct as a Double Jeopardy Bar: Petitioner has proven that the lead prosecutor at his first trial for capital murder intentionally suppressed material, exculpatory evidence so as to prevent the acquittal that otherwise would have occurred had he not suppressed the evidence. There is no principled distinction between overt misconduct designed to prevent an acquittal and covert misconduct motivated by the same purpose. Petitioner's lead prosecutor possessed sufficient intent to subvert Petitioner's double jeopardy rights at his first trial, on appeal, and during post-conviction proceedings for this Court to erect a bar against Petitioner's reprosecution under *Oregon v. Kennedy*, 456 U.S. 667 (1982).

Second Question Presented – Right to Double Jeopardy Legal Sufficiency Review: Pretrial review of the legal sufficiency of the State's case is required when the defendant's prior conviction was overturned due to overt or covert prosecutorial misconduct aimed at preventing an otherwise likely acquittal. Under such circumstances, the

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[7] The issue is not whether, in the abstract, facts necessitating reversal on the basis of a *Brady* claim can form the basis for a double jeopardy bar to retrial. Rather, the question is whether the *scienter* (or motive) of the prosecutor associated with a given *Brady* violation, as determined through the objective circumstances, requires the Court to bar retrial out of respect for society's and the defendant's interests.

prosecutor's misconduct operates as a jeopardy terminating event. The Texas Court of Criminal Appeals erred in failing to address the merits of Petitioner's legal sufficiency challenges.

REASONS FOR GRANTING THE PETITION

A. FIRST QUESTION PRESENTED – COVERT INTENTIONAL MISCONDUCT AS A DOUBLE JEOPARDY BAR.

For more than fifteen years, since the advent of *Oregon v. Kennedy*, 456 U.S. 667 (1982), federal and state courts have been wrestling with the impact of that case on retrials following appellate reversal for prosecutorial misconduct. Essentially all federal circuit courts have found that the *Kennedy* double jeopardy bar would reasonably be applied in certain prosecutorial misconduct post-reversal situations. Most state courts of last resort that have addressed the issue have also found that retrial may be barred on double jeopardy grounds following appellate reversal for certain levels of prosecutorial misconduct. The state courts have either adapted *Kennedy* to the post-reversal situation, or have rejected the rule therein as too narrow and have recognized the cognizability of post-reversal claims and/or granted relief under their own state double jeopardy clauses.

The Second Circuit Court of Appeals has articulated a standard for a double jeopardy bar following appellate reversal for covert prosecutorial misconduct that adequately respects the balance of interests between the state jurisdictions and defendants that must be entertained in any double jeopardy situation. *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992), *cert. denied*, 508 U.S. 939 (1993)). That standard, moreover, adequately follows this Court's jurisprudence in *Kennedy*, correctly focussing on prosecutorial motive to subvert the protections of the

Double Jeopardy Clause. No federal court, as yet, has granted relief on a post-reversal prosecutorial misconduct double jeopardy claim, including the Second Circuit itself, because none has yet encountered proof of the facts necessary and sufficient to demonstrate the required motive. Petitioner has proven such facts that would entitle this Court to grant him relief under *Wallach*, or a similar standard. Intentional suppression of evidence that would have acquitted Petitioner at his first trial is proven. Prosecutorial motive to subvert Petitioner's double jeopardy rights is also proven, because it has to be inferred from the uncontested facts.

1. The Texas Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

The Court of Criminal Appeals majority has seriously misunderstood the interrelationship between this Court's *acquittal* line of double jeopardy cases and its discussion in *Kennedy* of prosecutorial misconduct as a basis for a double jeopardy bar. *See Lockhart v. Nelson*, 488 U.S. 33, 36 n.2 (1988) (linking the *Burks* acquittal line of cases and *Kennedy*); *Oregon v. Kennedy*, 456 U.S. 667, 678-79 (1982) (tying standard announced for a bar following mistrial to "judicial or prosecutorial impropriety designed to avoid an acquittal"); *Burks v. United States*, 437 U.S. 1 (1978) (requiring bar to reprosecution following appellate acquittal). The Court of Criminal Appeals' holding, preventing extension of the rule in *Kennedy* to the post-reversal context, cannot be commensurate with this Court's intent in fashioning the *Kennedy* standard. This Court, indeed, has reserved the question whether the kind of prosecutorial misconduct addressed in *Kennedy* supports a double jeopardy bar even when there was no

prior appellate acquittal. *Lockhart v. Nelson*, 488 U.S. 33, 36 n.2 (1988).

2. The essence of double jeopardy protection – freedom from successive prosecution – should require this Court to hold explicitly that covert misconduct leading to appellate reversal may be as much a basis for relief as overt misconduct designed to provoke a mistrial.

The fundamental double jeopardy issue always at stake is whether the State has impermissibly exposed the defendant to the risk of successive prosecution. The defendant's right to control over the termination or continuation of his first tribunal serves his more primary right not to be subjected to successive prosecution brought in bad faith by the State. *Oregon v. Kennedy*, 456 U.S. 667, 671, 675-76 (1982) (describing the derivative right as "a part of . . . protection against multiple prosecutions"); *United States v. Scott*, 437 U.S. 82, 94 (1978); *United States v. Dinitz*, 424 U.S. 600, 610-11 (1976). Conduct intentionally undertaken to prevent a likely acquittal (whether overt or covert) triggers the federal Double Jeopardy Clause because it reveals a desire on the part of the prosecutor to place the defendant at risk of subsequent prosecution, when the initial proceeding would otherwise be fairly decided against the State:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the

> possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957); *see United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (observing that "permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression"); *see also Lockhart v. Nelson*, 488 U.S. 33, 42 (1988) (stating that the purpose of the double jeopardy clause is to prevent government oppression).

The burden of multiple prosecution on the defendant is readily apparent when the State attempts to retry him in the face of an extant conviction or acquittal. *North Carolina v. Pearce*, 395 U.S. 711 (1969). It is not so apparent when the defendant himself opts for a mistrial or seeks and achieves reversal of his conviction on appeal, because in both of these circumstances the defendant plays a role in creating the possibility of a second trial and the burden of retrial on the defendant also may be offset by society's continued interest in "punishing one whose guilt is clear after he has obtained [a fair] trial." *United States v. Tateo*, 377 U.S. 463, 466 (1964); *see Burks*, 437 U.S. at 15-16; *United States v. Ball*, 163 U.S. 662, 671-72 (1896) (establishing the "*Ball* Rule" that retrial following appellate reversal for trial error generally does not offend double jeopardy).[8] However, the State becomes responsible for the second trial when it commits misconduct during the first trial out of "fear that the jury [is otherwise] likely to acquit the accused." *Kennedy*, 456 U.S. at 673 n.4 (quoting *Tateo*, 377 U.S. at 468 n.3). When such

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[8] The defendant's and society's interests converge in preventing the repeated harassment of persons whose guilt is far from clear. *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Green v. United States*, 355 U.S. 184, 187-88 (1957).

misconduct is committed, the defendant's right to be free of multiple prosecution returns in full force, and society's interest in "punishing the guilty" is greatly diminished.

When the prosecutorial motive is present, there is no "principled distinction," therefore, for double jeopardy purposes, "between the open error, which might lead to a mistrial, and the covert error not discovered till after trial." *United States v. Catton*, 130 F.3d 805, 807 (7th Cir. 1997) (Posner, J., writing for panel) (noting that prosecutor at argument could not think of any such distinction). Petitioner's case is within the range of the Double Jeopardy Clause because:

> Confined to cases in which the defendant is goaded into moving for a mistrial, whether the motion is granted or denied, *Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for a mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial.

Catton, 130 F.3d at 807; *Wallach*, 979 F.2d at 916. When a prosecutor commits a covert error for "the same purpose that he might have committed an open error calculated to evoke a motion for mistrial . . . namely, to prevent an acquittal and so preserve the possibility of retrying the defendant even if the error is sure to be discovered and result in a reversal of conviction . . . the double jeopardy clause should protect the defendant against being retried." *Catton*, 130 F.3d at 807 (citing also *United States v. Pavloyianis*, 996 F.2d 1467, 1473-75 (2d Cir. 1993); *United States v. Gary*, 74 F.3d 304, 314-15 (1st Cir.), *cert. denied*, 116 S. Ct. 2567 (1996); *State v. Colton*, 663 A.2d 339, 346-48 (Conn. 1995), *cert. denied*, 516 U.S. 1140 (1996) (courts in agreement on a double jeopardy bar for covert misconduct); and contra, *State v. Swartz*, 541 N.W.2d 533, 538-40

(Iowa Ct. App. 1995), *cert. denied*, 517 U.S. 1172 (1996) (*see infra*)).

3. The Texas Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decisions of the majority (if not all) of the United States courts of appeals.

Most, if not all, of the federal circuit courts have accepted the cognizability of post-reversal double jeopardy claims based upon prosecutorial misconduct. *Catton*, 130 F.3d at 807-09 (accepting *Wallach* standard as sound, distinguishing *Beringer v. Sheahan*, 934 F.2d 110 (7th Cir. 1991), and finding insufficient proof of prosecutorial motive); *Gary*, 74 F.3d at 314-15 (noting *Wallach* test with approval, but finding no evidence of prosecutorial misconduct in the instant case); *Pavloyianis*, 996 F.2d at 1474; *Wallach*, 979 F.2d at 916; *United States v. Quinn*, 901 F.2d 522, 531 (6th Cir. 1990); *Evans v. Thompson*, 881 F.2d 117, 123 n.1 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990); *United States v. Singer*, 785 F.2d 228, 239 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982); *United States v. Curtis*, 683 F.2d 769, 774 (3d Cir.), *cert. denied*, 459 U.S. 1018 (1982); *United States v. Roberts*, 640 F.2d 225, 231 (9th Cir.), *cert. denied*, 452 U.S. 942 (1981) (Norris, J., dissenting) (pre-*Kennedy*); *United States v. Rios*, 637 F.2d 728, 729 (10th Cir. 1980), *cert. denied*, 452 U.S. 918 (1981) (pre-*Kennedy*). At least four concurring justices in *Kennedy* agreed with post-reversal double jeopardy prosecutorial misconduct relief. *Robinson*, 686 F.2d at 308 (citing *Kennedy*, 456 U.S. at 687 n.22). *See also United States v. Gambino*, 838 F. Supp. 744 (S.D. N.Y. 1993) (adopting *Wallach* test to determine whether new trial barred due to alleged *Brady* violation); *United States v. Gollamudi*, 1993 U.S. Dist. LEXIS 1402 (E.D. N.Y.

1993), at *5 (applying the *Wallach* test at the government's request).

The Second Circuit's standard sensitively preserves the "precise distinction drawn in *Kennedy* between misconduct that merely results in a mistrial and misconduct undertaken for the specific purpose of provoking a mistrial" by finding that double jeopardy bars retrial after reversal "only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct." *Wallach*, 979 F.2d at 916. This distinction respects the concerns expressed in *Kennedy* that the Supreme Court's prior line of cases regarding "prosecutorial overreaching" as a basis for double jeopardy bar did not hone in on the prosecutorial intent required to unfairly divest the defendant of his valued right to trial by the first tribunal. 456 U.S. at 674-75.

This Court in *Kennedy* was particularly worried that the language in *United States v. Dinitz*, 424 U.S. 600 (1976), and other cases, referring to "bad faith conduct" or "harassment" was so broad as to offer no standards for application. *Id.* at 674-75; and 687 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., concurring in judgment). Noting that "every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant," and criticizing the "broad and amorphous" nature of the prior standard for identifying prosecutorial "overreaching," the Court adopted what it believed to be a more workable standard allowing a double jeopardy bar only in situations in which "a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal." *Id.* at 674, 676, & 679-80 (quoting in support of the new standard *United States v. Jorn*, 400 U.S. 470, 485 n.12 (1971)).

Justice Stevens, in his *Kennedy* concurring opinion, also recognized the critical element of specific prosecutorial intent related to foresight of acquittal. As a factor to inform the Court's judgment in finding prosecutorial "overreaching" sufficient to pose a double jeopardy bar, Stevens observed:

> [B]ecause the defendant's option to abort the proceeding after prosecutorial misconduct would retain real meaning for the defendant in any case in which the trial was going badly for him, normally a required finding would be that the prosecutorial error virtually eliminated, or at least substantially reduced, the probability of an acquittal in a proceeding that was going badly for the government.

456 U.S. at 690 (Stevens, J., concurring in judgment, joined by 3 others). By limiting post-mistrial relief to situations in which a finding may be made that the prosecutor intended to provoke the defendant into moving for the mistrial, the *Kennedy* majority makes the factor of foresight of acquittal mandatory, whereas Justice Stevens would only hold it advisory.[9]

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[9] The issue that divides the majority and concurring opinions in *Oregon v. Kennedy* is whether relief turns on the prosecutor's foresight of "the probability of an acquittal in a proceeding that [is] going bad for the government." 456 U.S. at 690 (Stevens, J., concurring in judgment, joined by Brennan, Marshall, and Blackmun, JJ.). The majority would require the prosecutor to be motivated to commit misconduct by such foresight. *Id.* at 679-80. His misconduct would have to be "designed to avoid an acquittal." *Id.* Although they also consider such foresight a crucial motivation, the concurring Justices do not find it essential in all cases. *Id.* at 690 (Stevens, J., concurring). The *Kennedy* Court, therefore, does not focus its concern on specific intents, such as a specific intent to goad a defendant into moving for mistrial or a specific intent to

The Seventh Circuit panel in *Catton* recently noted that "any greater extension of *Kennedy*" than post-reversal relief when the prosecutor acted on such foresight would have to be recognized by this Court. *Catton*, 130 F.3d at 808. There are plenty of federal and state courts that would benefit by this Court's evaluation of the *Wallach* standard itself, and application of that standard to Petitioner's case. Although they have recognized the viability of such a standard, the federal and state courts have been in a holding pattern, waiting for this Court to have the proper case in which to rule on the issue of post-reversal relief.

4. The Texas Court of Criminal Appeals has decided an important federal question in a way that conflicts with the decisions of other state courts of last resort.

Most state courts of last resort that have addressed post-reversal double jeopardy bars for prosecutorial misconduct have either adopted the standard in *Wallach* or they have found this Court's standard in *Kennedy* to be too narrowly drawn to protect the double jeopardy rights of a defendant in Petitioner's situation and have created standards based on their state constitutions.

The Supreme Court of Connecticut has adopted *Wallach*, remanding a covert misconduct case for factual development and consideration under the *Wallach* standard. *Colton*, 663 A.2d at 346-48. The California Supreme Court has extended *Kennedy* to the post-reversal context,

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surreptitiously undermine an otherwise likely acquittal, but rather looks to the motive of the prosecutor vis-a-vis the prospective outcome of the trial when he chooses to commit his misconduct.

holding that prosecutorial intimidation of certain witnesses did not manifest the requisite intent to subvert the defendant's double jeopardy rights. *In re Martin*, 744 P.2d 374, 407-08 (Cal. 1987). Lower state courts in Georgia and Pennsylvania have adopted *Wallach* as consistent with their states' high court jurisprudence. The Georgia Court of Appeals has adopted and applied *Wallach*, denying relief for lack of evidence of an intent to avoid a likely acquittal. *State v. D'Auria*, 492 S.E.2d 918, 920-21 (Ga. App.), *cert. denied*, 1998 Ga. LEXIS 356 (Ga. Feb. 27, 1998). The Pennsylvania Superior Court has found *Wallach* to be "perfectly consistent" with the Pennsylvania Supreme Court's holding in *Commonwealth v. Smith*, 615 A.2d 321 (1992), barring retrial in the post-reversal context when prosecutorial misconduct is "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Commonwealth v. Simone*, 1998 Pa. Super. LEXIS 832 (Pa. Super. May 21, 1998).

Many state courts of last resort have found that their own state Double Jeopardy clauses bar retrial after appellate reversal in certain cases involving prosecutorial misconduct. *State v. Breit*, 930 P.2d 792 (N.M. 1996); *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992); *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983); *Commonwealth v. Lam Hue To*, 461 N.E.2d 776 (Mass. 1984); *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984); *Collier v. State*, 747 P.2d 225 (Nev. 1987), *cert. denied*, 486 U.S. 1036 (1988). In *State v. Hopson*, 778 P.2d 1014 (Wash. 1989), the Washington Supreme Court considered both the Oregon standard (because the constitutional clauses are similar) and *Kennedy*, finding that the facts of the case would not support a bar under either standard. *Id.* at 1017-19. *See also State v. White*, 354 S.E.2d 324, 329 (N.C. Ct. App. 1987), *aff'd*, 369

S.E.2d 813 (N.C. 1988) (finding *Kennedy* standard insufficient compared to standard measuring "bad faith overreaching . . . aimed at prejudicing the defendant's chances for acquittal, whether in the current trial or a retrial").

Texas may have the only state court of last resort that simply has rejected the cognizability of a double jeopardy post-reversal bar based on prosecutorial misconduct. *Ex parte Mitchell*, 1997 Tex. Crim. App. LEXIS 92 (Tex. Crim. App. 1997); *Ex parte Davis*, 957 S.W.2d 9 (Tex. Crim. App. 1997), *cert. denied*, 118 S. Ct. 1307 (1998); *see State v. Swartz*, 541 N.W.2d 533 (Iowa Ct. App. 1995) (lower appellate court). Texas and Iowa courts err by restricting the requisite *scienter* to prosecutorial intent to create a mistrial, while misunderstanding at the same time that prosecutorial motive to avoid an otherwise likely acquittal is what generates double jeopardy protection in any context.

5. The Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, because the Court of Criminal Appeals' dangerous resolution of the issue threatens to undermine the double jeopardy protection of all defendants.

The Court of Criminal Appeals' majority concluded that "the accused's right under the double jeopardy clause to have his trial completed by the first tribunal is clearly protected where, as in the present case, it proceeded to conclusion, i.e., a verdict." *Ex parte Mitchell*, 1997 Tex. Crim. App. LEXIS 92, at *13 (1997). The majority held that double jeopardy protection exists only where a mistrial has actually occurred as the result of deliberate prosecutorial misconduct. It added that "to hold otherwise would be inconsistent with the applicable Supreme Court precedent." *Id.*

The position taken by the Court of Criminal Appeals that the Double Jeopardy Clauses only serve to ensure the defendant's right of control over the outcome of his first proceeding tends to support the dangerous conclusion that the Double Jeopardy Clauses are not so much designed to protect defendants from governmental oppression as to provide for orderly procedure.

The Iowa Court of Appeals fell into this kind of error in *State v. Swartz*, 541 N.W.2d 533 (Iowa Ct. App. 1995), *cert. denied*, 517 U.S. 1172 (1996). Swartz' conviction was overturned due to prosecutor's "knowing and deliberate use of perjury." *Swartz v. State*, 506 N.W.2d 792, 798 (Iowa App. 1993). When the State sought to retry him, Swartz moved to dismiss on several grounds, including double jeopardy. 506 N.W.2d at 536. The Court of Appeals found that, because Swartz offered no evidence concerning the prosecutor's intent at the time of trial, he failed to meet the *Wallach* standard for a post-reversal double jeopardy bar. More importantly, the court stated that it "believed" "extending" *Kennedy* to post-reversal contexts would be "incompatible with the aim of the Double Jeopardy Clause" which it described as "at least" preserving the defendant's right to primary control of the decision whether to have the first trial concluded by the jury. 541 N.W.2d at 539. By so restricting the scope of protection, the Court of Appeals went a step too far, insulating the State from the defendant's double jeopardy protections:

> The right of appeal, not the Double Jeopardy Clause, protects defendants from the underlying errors which may ultimately be found to have rendered the trial unfair. *Beringer*, 934 F.2d at 113. ***The Double Jeopardy Clause does not serve to protect defendants from prosecutorial misconduct,*** but to ensure that the defendant gets to choose

> whether to go to verdict. *Id.* We think any other interpretation overly extends the Double Jeopardy Clause, under both our federal and state constitutions.

Id. at 539 (citing *Beringer v. Sheahan*, 934 F.2d 110, 113 (7th Cir. 1991) (which, after referring to the *Burks* rule, states that the Double Jeopardy Clause "serves not to **punish** prosecutorial misconduct") (emphasis added).

The Texas Court of Criminal Appeals and the Iowa Court of Appeals have erected a false dichotomy between protection against prosecutorial misconduct and the defendant's right to control, between due process and double jeopardy. Clearly, the Double Jeopardy Clauses do **protect** against judicial or prosecutorial manipulation aimed at undermining the defendant's right to avoid successive prosecution. Both courts fail to apprehend the significance of implicit acquittal as the proper distinguishing element between an unfair trial that violates due process only and one that violates double jeopardy. The Iowa court's analysis further illustrates how the exceedingly narrow double jeopardy standard advanced by both courts swallows the rule of protection against successive prosecution with that rule's application to the mistrial context. In Iowa and Texas, apparently, the prosecutor will be free to violate the defendant's right against successive prosecution by overtly or covertly manipulating the trial process to avoid an otherwise likely acquittal with a Pandora's Box of misconduct, so long as the defendant does not move for and achieve a mistrial based on the misconduct. Overt misconduct that denies the defendant a probable acquittal in his first trial (thus violating the finality or repose guaranteed by the Double Jeopardy Clauses) will go unchecked, and irremediable, where there is no motion for mistrial or proper response by the trial court. Covert misconduct on the same order will be freely allowed to violate the defendant's right to finality,

exposing him to an unfair conviction and sure retrial upon discovery of the misdeeds, while stripping him of a probable acquittal on the first go-around.[10]

The Fifth Amendment Clause is not designed and has never been construed by this Court to guarantee the defendant the chimerical right to have his case tried to verdict before his first tribunal absent a fundamentally

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[10] The Iowa Court of Appeals' reasons for allowing such an imbalance in protection are wholly unpersuasive.

First, the court observed that the *Wallach* rule would require a difficult "post-hoc consideration of the prosecutor's intent at the time he or she engages in the misconduct." *Swartz*, 541 N.W.2d at 539-40. Although the "difficulty" of such consideration has caused a number of state courts to broaden the standard of prosecutorial mens rea, such difficulty – if there be any – is inextricable from the most narrowly-tailored rule drawn from *Kennedy* ("intent to provoke a mistrial"), and thus, this "difficulty" fails to differentiate post-reversal review in any meaningful way from straightforward review under *Kennedy* when a mistrial has been declared.

Second, the Iowa court complained that evaluating the prosecutor's intent was inevitably a "factual analysis" leading to the consideration of "the sufficiency of the evidence at the time the prosecutor engaged in the misconduct." *Id.* at 540 (citing *Wallach*, 979 F.2d at 916-17; *Pavloyianis*, 996 F.2d at 1474). This observation is quite true, and demonstrates a significant interconnection between the prosecutorial misconduct (or "mistrial") line of cases and *Burks*. However, the same sufficiency review will be required of a court reviewing a case in which mistrial was declared, because the court must determine whether the prosecutor intended by his actions to subvert the defendant's double jeopardy rights.

Lastly, the Iowa court complained that the Second Circuit mingled the misconduct and sufficiency strands of double jeopardy jurisprudence. *Id.* at 540 (citing *Beringer*, 934 F.2d at 112). This Court has already demonstrated in *Kennedy* that such mingling is necessary, because the defendant's finality interest in an implied acquittal is what is protected.

fair proceeding. *Oregon v. Kennedy*, 456 U.S. at 672. This Court has emphasized that the Double Jeopardy Clause protects not only the defendant's right to a fair trial, but the **society's** interest in a fair system. *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988); *United States v. Martin Linen Supply*, 430 U.S. 564, 569 (1977); *Green v. United States*, 355 U.S. 184, 187-88 (1957). If unchecked, the Texas and Iowa opinions will erode a cherished right designed to protect us all from oppressive government.

B. SECOND QUESTION PRESENTED – RIGHT TO DOUBLE JEOPARDY LEGAL SUFFICIENCY REVIEW.

This Court has held that pretrial review of double jeopardy claims based upon evidentiary sufficiency is required under *Abney* where a petitioner "seeks review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of his separate claim of double jeopardy." *Richardson v. United States*, 468 U.S. 317, 321-22 (1984). The Texas Court of Criminal Appeals' failure to review Petitioner's sufficiency claims directly violates this holding of the Court in *Richardson*.

This Court also observed in *Richardson*, however, that its holding in *Burks* "did not extend beyond the procedural setting in which it arose," implying that a second trial would be barred by the Double Jeopardy Clause only when a defendant had "obtained an *unreversed appellate ruling* that the Government had failed to introduce sufficient evidence to convict him at trial." *Id.* at 323 (emphasis added). *Richardson* denied review on a double jeopardy claim arising out of a mistrial based on a hung jury. Some federal circuit courts have interpreted *Richardson* to stand for the proposition that defendants are not

entitled to collateral review of sufficiency when the conviction was reversed on non-sufficiency grounds. *See, e.g., United States v. Miller*, 952 F.2d 866, 872-74 (5th Cir.), *cert. denied*, 112 S. Ct. 3029 (1992); *United States v. Gutierrez-Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994).

Other federal circuit courts have not been so quick to automatically apply the "continuing jeopardy" concept as it was reformulated in *Richardson* and *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), to every procedural stance, without continuing to weigh the equities between the defendant and society that are present in any potential double jeopardy situation. *See United States v. Wood*, 958 F.2d 963, 970 (10th Cir. 1992) (citing *Breed v. Jones*, 421 U.S. 519, 534 (1975) (distinguishing between "concept" and "conclusion" of "continuing jeopardy" and reasoning that "a more satisfactory explanation [for double jeopardy analysis] lies in an analysis of the respective interests involved")).

This Court should explicitly hold that prosecutorial misconduct designed to prevent an otherwise likely acquittal interrupts "continuing jeopardy" and places the balance of the equities on the side of the defendant. Petitioner believes that, on that basis, his case should be remanded to the Texas Court of Criminal Appeals for double jeopardy legal sufficiency review.

1. The Texas Court of Criminal Appeals' failure to address Petitioner's double jeopardy challenge to the legal sufficiency of his prior conviction in light of the prosecutorial misconduct conflicts with relevant decisions of this Court.

Although it seemed to accept review and briefing on the issues, the Texas Court of Criminal Appeals neglected to consider the merits of Petitioner's legal sufficiency

double jeopardy claims. This oversight by the Court violated the principle developed in *Abney, Richardson,* and many of this Court's opinions that double jeopardy claims must be reviewed before the harm against which the clause protects may ensue. *Richardson,* 468 U.S. at 321. No "continuing jeopardy" exists that would have prevented the Texas Court of Criminal Appeals from reviewing the merits of Petitioner's legal insufficiency double jeopardy claim because, as this Court has suggested, the "continuing jeopardy" principle should not apply when the prior conviction was burdened with the kind of prosecutorial misconduct addressed in *Kennedy. Lockhart,* 488 U.S. at 36 n.2 (citing *Oregon v. Kennedy,* 456 U.S. 667 (1982)).

Several federal circuits have recognized this *Lockhart* "exception" to "continuing jeopardy." *See, e.g., Palmer v. Clarke,* 961 F.2d 771, 775 (8th Cir. 1992) (finding prosecutorial misconduct an integral part of state prisoner's double jeopardy sufficiency claim); *Evans v Thompson,* 881 F.2d 117, 123 n.1 (4th Cir. 1989), *cert. denied,* 497 U.S. 1010 (1990) (cited by *Palmer* as recognizing that prosecutorial misconduct in submission of evidence may violate double jeopardy); *United States v. Quinn,* 901 F.2d 522, 531 (6th Cir. 1990) (cited in *Palmer* as also recognizing *Lockhart*'s "exception").

The prosecutorial misconduct committed by the Smith County Assistant District Attorneys (when coupled with the evidentiary insufficiency) operates as a jeopardy terminating event, because it changes the character of the case into one manifesting "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect," as opposed to a case merely "affording a defendant two opportunities to avoid conviction

and secure an acquittal." *Lydon*, 466 U.S. at 310 (citation omitted), 312.[11]

Petitioner urged the Texas Court of Criminal Appeals to recognize that it had erred in concluding on direct appeal that there was sufficient evidence to sustain Petitioner's conviction and that, because there was not sufficient evidence (excluding or including the suppressed material, exculpatory evidence), it should bar the retrial of Petitioner. Texas law requires that, where the testimony of an accomplice is necessary to prove any essential element of the crime, that testimony must be corroborated by adequate independent evidence. TEX. CODE CRIM. PROC. art. 38.14 (1979 & 1998). The only evidence implicating Petitioner in the crime was from the two accomplice witnesses. The evidence offered to corroborate their testimony was not legally sufficient.[12]

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[11] The Fifth Circuit's decision in *Miller* must be distinguished on this basis. The Court of Appeals announced in that case that pretrial double jeopardy claims seeking sufficiency review like those raised in *Miller* and *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983), would no longer be "colorable" in the Fifth Circuit in light of *Richardson*. 952 F.2d at 872 n.5. The convictions in those cases were reversed for indictment (*Miller*) and jury selection (*Sneed*) errors, without any question of prosecutorial misconduct.

[12] The Texas Court of Criminal Appeals stated in 1993 that it had previously found corroborative the following:

> independent evidence show[ing that] the accomplices and [Petitioner] were together shortly before and after the alleged time of the commission of the murder . . . [which also] placed the three men in the vicinity of the fireworks stand; the bullet fragments removed from the deceased were fired from a .38 calibre weapon . . . [and] a witness stated that he saw a .38 calibre handgun in [Petitioner's] bedroom a few weeks after the murder; and the medical examiner

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> . . . testified that [the victim] was shot between the eyes [and an "accomplice"] testified that [Petitioner] told him that he shot [the victim] between the eyes.

Mitchell, 853 S.W.2d at 2 (citing *Mitchell v. State*, 650 S.W.2d at 804-09).

Under Article 38.14, Texas Code of Criminal Procedure, the test for sufficiency of corroboration is:

> to eliminate from consideration the evidence of the accomplice witness and then to examine the evidence of the other witnesses with the view to ascertain *if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense.* If there be such evidence, the corroboration is sufficient; otherwise, it is not.

Munoz v. State, 853 S.W.2d 558, 559-60 (Tex. Crim. App. 1993); *Anderson v. State*, 717 S.W.2d 622, 631 (Tex. Crim. App. 1986) (emphasis in original).

Mere presence near the crime scene is not sufficient, by itself, to corroborate accomplice testimony under Texas law. *See Cherb v. State*, 472 S.W.2d 273 (Tex. Crim. App. 1971); *Edwards v. State*, 427 S.W.2d 629 (Tex. Crim. App. 1968); *Story v. State*, 221 S.W.2d 917 (1949). In addition, the "alleged time of the commission" has now been thrown into complete doubt, making the alleged sighting of Petitioner valueless for corroborating the accomplices' account of the offense. The weapon was never recovered for any forensics comparison, and it was alleged to have been seen in a house occupied by all three codefendants. Lastly, the hearsay testimony produced through the "accomplice" is merely accomplice testimony, and not corroboration at all.

2. The Texas Court of Criminal Appeals' failure to address Petitioner's double jeopardy challenge to the legal sufficiency of his prior conviction in light of the prosecutorial misconduct decides an important federal question in a way that conflicts with decisions by United States courts of appeals.

The state and federal courts would benefit from a decision by this Court on the question whether pretrial double jeopardy review of legal sufficiency is required when the prior conviction was reversed for intentional prosecutorial misconduct. The Tenth Circuit has observed that this Court's broad language in *Richardson* gives little guidance "on what events, other than an acquittal, terminate jeopardy." *Wood*, 958 F.2d at 969. Possibly as a result, the federal circuits seem to be split on the question whether the parameters of double jeopardy legal sufficiency review are to be circumscribed by a narrow interpretation of *Richardson* or the *Lockhart* footnote invoking *Kennedy*. *Compare, supra, Miller* and *Gutierrez-Samarano* with *Wood, Palmer, Evans,* and *Quinn*.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS [1997]

Ex parte ANDREW LEE MITCHELL, Applicant

No. 1493-96

COURT OF CRIMINAL APPEALS OF TEXAS

1997 Tex. Crim. App. LEXIS 92

November 19, 1997, Delivered

SUBSEQUENT HISTORY:

Concurring Opinion to Denial of Applicant's Motion for Rehearing April 15, 1998, Reported at: *1998 Tex. Crim. App. LEXIS 50.*

PRIOR HISTORY: Appeal from the Twelfth Applicant [sic] Court of Appeals. (Smith County).

DISPOSITION: Affirmed.

COUNSEL: David L. Botsford, Austin. Clifton Holmes, Longview.

Edward J. Marty, Assist. DA, Tyler. Matthew Paul, State's Attorney, Austin.

JUDGES: MANSFIELD, J. KELLER, J., CONCURS IN THE RESULT. MEYERS, J. BAIRD, Judge. Overstreet, J., joins this opinion.

OPINION BY: MANSFIELD

OPINION: OPINION ON APPLICANT'S PETITION FOR DISCRETIONARY REVIEW

Applicant, Andrew Lee Mitchell, was convicted of the offense of capital murder alleged to have been committed on or about December 26, 1979. His conviction was affirmed on direct appeal. *Mitchell v. State*, 650 S.W.2d 801 (Tex.Crim.App. 1983). Subsequently, applicant sought post-conviction relief by filing a petition for writ of habeas corpus. Applicant alleged in his petition the State had withheld material exculpatory evidence, thereby denying his rights to due process and due course of law. This Court granted applicant's claim for relief and vacated his conviction and sentence. *Ex parte Mitchell*, 853 S.W.2d 1 (Tex.Crim.App. 1993) (*Mitchell I*).

The State then scheduled applicant's case for retrial. Applicant, in order to prevent his retrial, filed the present petition for writ of habeas corpus. In his petition, applicant alleged the State's reprosecution of him for capital murder would violate his double jeopardy rights under both the United States and Texas Constitutions. Furthermore, applicant averred his reprosecution would violate his rights to due process and due course of law under the federal and state constitutions. The trial court denied relief, and the Twelfth Court of Appeals affirmed. *Mitchell v. State*, 1996 Tex.App. LEXIS 4208, 1996 WL 514266 (Tex.App. – Tyler 1996) (*Mitchell II*).

Applicant, in his petition for discretionary review, alleged six grounds for review. We granted his petition for discretionary review to consider only the following two grounds:

> 1. The Court of Appeals erred in holding that applicant's reprosecution is not barred by the double jeopardy clause of the Fifth Amendment

to the United States Constitution due to the intentional prosecutorial misconduct that formed the basis of this Court's reversal of applicant's prior conviction.

2. The Court of Appeals erred in holding that applicant's reprosecution is not barred by the double jeopardy clause of Article I, Section 14 of the Texas Constitution due to the intentional (or reckless) prosecutorial misconduct that formed the basis of this Court's reversal of applicant's prior conviction.

We affirm the judgment of the Court of Appeals, thereby overruling both of applicant's grounds for review and denying relief.

In reversing applicant's conviction in *Mitchell I*, in a unanimous decision, this Court found the State suppressed material exculpatory evidence which could have been used to impeach the State's accomplice witnesses and the suppression of which undermined confidence in the verdict. The suppressed evidence consisted of statements by a game warden, Ralph East, and a Smith County deputy sheriff, Kelly Stroud. East and Stroud, in their statements, indicated they observed the victim alive ("as far as they could tell") sometime around midnight at the fireworks stand where he worked.[1] These statements

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[1] The victim was found shot to death at the fireworks stand where he was employed. The indictment averred he was killed during a robbery of the fireworks stand. The two accomplice witnesses testified applicant shot and killed the victim at about 8:30 PM. There was no corroboration of the accomplice witnesses' testimony as to the time of the killing of the victim. East and Stroud did not speak to the victim; their conclusions

contradicted testimony of the State's accomplice witnesses, who testified the offense was committed at least three hours prior to midnight. Other evidence introduced by the State placed appellant in the company of friends at midnight and thereafter at a club and motel in Tyler.

At the 1989 hearing held pursuant to the writ application which resulted in *Mitchell I*, it appeared that the existence of East's and Stroud's statements (which were in the possession of the Smith County Sheriff's Department) was not known to the Smith County District Attorney's Office. This Court found, however, the statements of East and Stroud were concealed by the Smith County Sheriff's Department. We found further the statements were material and exculpatory as they impeached the testimony of the accomplice witnesses on the critical issue of when applicant allegedly killed the victim. Thus, relying on our decision in *Thomas v. State*, 841 S.W.2d 399, 404-405 (Tex.Crim.App. 1992), we vacated applicant's conviction.

However, at the hearing held pursuant to the present writ application in July of 1996, it was revealed that the lead prosecutor at applicant's 1981 trial had knowledge of East's observations at the time of trial. Handwritten notes of the lead prosecutor referred to East's observations. It is therefore reasonable to conclude that not only did the Sheriff's Department fail to reveal East's potentially exculpatory statement to applicant at both the time of his trial as well as at the time of the 1989 hearing conducted

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that the victim was alive were based on seeing the victim sitting in front of a television at the fireworks stand as they drove by.

as part of *Mitchell I*, but that the Smith County District Attorney's Office also failed to reveal East's statement to applicant despite having knowledge of its existence at the time of the 1981 trial. It is not clear whether the Smith County District Attorney's Office was aware of Stroud's statement either at the time of the 1981 trial or at the time of the 1989 hearing.[2]

It is well-established that the State has an affirmative duty to make available to an accused, in a timely manner, exculpatory evidence which is in its possession. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Supreme Court, in *Brady*, held that "suppression by the prosecution . . . violated due process . . . irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87-88.

Brady has been extended to include the required revelation to an accused of material exculpatory evidence in the possession of police agencies and other parts of the "prosecutorial team." *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Evidence whose value is limited to that of impeachment must also be divulged to the accused if the failure to do so by the State undermined confidence in the trial's outcome. *United States v.*

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[2] Applicant was notified before his 1981 trial that Ralph East was a witness; East was called and testified at the trial. The prosecutor, though he testified at the 1989 hearing, did not testify at the 1996 hearing, though he was available to do so. In *Mitchell I*, we held East's and Stroud's statements, which investigators for the Sheriff's Department claimed were equivocal and therefore not believable, should nonetheless have been revealed to applicant. *Mitchell I*, 853 S.W.2d at 4-5.

Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

It is significant to note the Supreme Court has consistently treated the failure by the State to divulge potentially exculpatory evidence (whether directly exculpatory or exculpatory as having impeachment value) as a violation of an accused's due process right to a fair trial where the failure undermined confidence in the trial's outcome. The remedy prescribed in such cases is reversal of his conviction and remand of the cause to the trial court for further proceedings. *Brady v. Maryland, supra; Kyles v. Whitley, supra; United States v. Bagley, supra.*

In numerous cases, most recently *Ex parte Davis*, 1997 Tex. Crim. App. LEXIS 66, No. 495-95 (Tex.Crim.App.) (delivered September 17, 1997), this Court has found reversal, and remand to the trial court for further proceedings, to be the proper remedy where the first trial was unconstitutionally tainted by prosecutorial misconduct. For example, in *Cook v. State*, 940 S.W.2d 623 (Tex.Crim.App.) (1996), we found prosecutorial misconduct, which included withholding of several pieces of potentially exculpatory evidence, combined with the false and misleading testimony of the prosecution's expert, violated applicant's rights under the Due Process Clause of the United States Constitution as well as his rights under the due course of law provisions of the Texas Constitution. In *Davis*, the prosecutorial misconduct included misleading the jury as to the quality of the police investigation, the misrepresentation by the prosecution as to his interrogation of a key witness (as to why she changed her testimony) and the use of false and perjured testimony by the State's expert witness. While

finding the behavior of the prosecutor to be reprehensible, we rejected applicant's contention that he was entitled to anything more than he had already received: reversal of his conviction on appeal.[3]

Applicant contends, however, that the double jeopardy clause of the Fifth Amendment to the United States Constitution bars his retrial because the reversal of this conviction was a result of intentional and egregious prosecutorial misconduct.

The United States Supreme Court has consistently held that when a trial proceeds to conclusion (i.e., a verdict) despite a legitimate claim of serious prejudicial error and the conviction is reversed on appeal, retrial is not automatically jeopardy-barred. *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896); *United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976); *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970). A retrial is barred on jeopardy grounds only if there is insufficient evidence to support the conviction. *United States v. Ball, supra; Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *United States v. Tateo*, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589, 12 L. Ed. 2d 448 (1964). The Supreme Court has held that where the State has in bad faith destroyed evidence favorable to the accused, retrial of the accused may be

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[3] We have similarly found in at least two other instances, that reversal of applicant's conviction and remand to the trial court for further proceedings to be the proper remedy where applicants' trials were tainted by serious prosecutorial misconduct. *Ex parte Adams*, 768 S.W.2d 281 (Tex.Crim.App. 1989); *Ex parte Brandley*, 781 S.W.2d 886 (Tex.Crim.App. 1989).

barred if the accused's due process rights are violated. *Arizona v. Youngblood*, 488 U.S. 51, 59, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988). The Court left open the question of whether, in such instances, retrial would be jeopardy-barred.

Underlying the Supreme Court's application of double jeopardy principles to instances where convictions have been reversed on appeal is the concept of "continuing jeopardy." Continuing jeopardy means, in effect, an accused may be retried after his conviction has been reversed on appeal because the proceedings against him never stopped. *Price v. Georgia, supra; Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 1813, 80 L. Ed. 2d 311 (1984); *Montana v. Hall*, 481 U.S. 400, 402-403, 107 S. Ct. 1825, 1826, 95 L. Ed. 2d 354 (1987).

It is a venerable principle of double jeopardy jurisprudence that the successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the conviction [citation omitted], poses no bar to further prosecution on the same charge. . . . Corresponding to the right of the accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the

accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

Montana v. Hall, 107 S. Ct. at 1825, 1826, citing *United States v. Tateo*, 84 S. Ct. at 1587, 1589.

Viewed in the context of the concept of "continuing jeopardy" the Supreme Court's holding in *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982) is logically consistent. In *Oregon v. Kennedy* the Court held the double jeopardy clause of the Fifth Amendment is not offended by a second prosecution for the same offense where the earlier proceeding was terminated as a result of the defendant's motion for mistrial unless the State deliberately set out to provoke the defendant's motion for mistrial, thereby violating the defendant's right under the double jeopardy clause to have his trial decided by the first tribunal. The granting of a motion for mistrial terminates the proceeding; the defendant's subsequent prosecution is a new proceeding. A retrial following a reversal, in contrast, is one uninterrupted proceeding.

Appellant does not direct us to any cases where the Supreme Court has explicitly extended *Oregon v. Kennedy* to apply to instances where verdicts of guilty have been reversed on appeal, due in whole or in part to prosecutorial misconduct, and thereby holding retrials as jeopardy-barred. The Second Circuit has held that double jeopardy would bar retrial after reversal "only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the

absence of his misconduct." *United States v. Wallach*, 979 F.2d 912, 916 (2nd Cir. 1992), *cert. denied*, 508 U.S. 939, 124 L. Ed. 2d 637, 113 S. Ct. 2414 (1993). See also, *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982).[4]

Where the prosecutor's actions are engaged in with the intent to persuade the factfinder to convict, instead of acquit, there is no double jeopardy violation under the Fifth Amendment. This is true even if the conviction is due in part to reversible errors, including intentional misconduct on the part of the State. The accused's right under the double jeopardy clause to have his trial completed by the first tribunal is clearly protected where, as in the present case, it proceeded to conclusion, i.e., a verdict. Only where the prosecutor's intentional, and deliberate misconduct goads the accused into moving for a mistrial – and that motion is granted – is the accused's right to be tried to verdict by the first tribunal, a right afforded him by the double jeopardy clause of the Fifth Amendment, violated.[5] As there was no mistrial in the

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[4] The Seventh Circuit, however, concluded the double jeopardy clause does not bar a retrial following reversal of a defendant's conviction on appeal due to prosecutorial misconduct. *Beringer v. Sheahan*, 934 F.2d 110, 114 (7th Cir.1991). See also, *United States v. Doyle*, 121 F.3d 1078, 1997 WL 430026 (7th Cir. 1997).

[5] As noted in the concurring opinion, the court of appeals emphasized *Oregon v. Kennedy*'s key point, that the defendant's right under the double jeopardy clause to have his case tried to verdict by the first tribunal is denied where he is forced into moving for a mistrial due to intentional prosecutorial misconduct. "Where the prosecution goads a defendant into moving for a mistrial, the accused no longer retains that important primary control over the course of his trial; instead,

present case, we hold applicant's double jeopardy rights under the United States Constitution are not violated by the State's retrial of applicant following reversal of his conviction. To hold otherwise would be inconsistent with applicable Supreme Court precedent which we are not free to ignore. Applicant's first ground for review is overruled.

We turn next to applicant's second ground for review which posits his retrial is barred by the double jeopardy clause of the Texas Constitution. Applicant is correct in his assertion that this Court, as well as the Texas Supreme Court, has held the Texas Constitution gives greater protection in some instances to Texas citizens than does its federal counterpart. *Heitman v. State,* 815 S.W.2d 681 (Tex.Crim.App. 1991); *Autran v. State,* 887 S.W.2d 31 (Tex.Crim.App. 1994) (plurality op.); *Davenport v. Garcia,* 834 S.W.2d 4 (Tex. 1992).

We have consistently held, however, that the Texas and United States constitutions' double jeopardy provisions provide substantially identical protections. *Phillips v. State,* 787 S.W.2d 391 (Tex.Crim.App. 1990); *Stephens v. State,* 806 S.W.2d 812 (Tex.Crim.App. 1990). Until recently, we had applied the standard of review set forth by the

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he is forced to seek a mistrial before a verdict is reached." *Mitchell II,* slip op. at 7, citing *Oregon v. Kennedy,* 102 S. Ct. at 2089. As there was no mistrial in the present case, the court of appeals concluded correctly that while the prosecutorial misconduct complained of constituted a routine due process violation under *Brady v. Maryland* and its progeny, entitling applicant to a new trial, there was no infringement of applicant's rights under the double jeopardy clause which would bar his retrial. *See Mitchell II,* slip op. at 8-9.

United States Supreme Court in *Oregon v. Kennedy, supra,* to double jeopardy claims arising out of instances where mistrials were provoked by the State. Thus, retrial was not barred by the Fifth Amendment's double jeopardy clause where the earlier proceeding was terminated by mistrial at the defendant's request unless the State deliberately set out to provoke the defendant's motion for mistrial. *Crawford v. State,* 703 S.W.2d 655 (Tex.Crim.App. 1986); *Anderson v. State,* 635 S.W.2d 722 (Tex.Crim.App. 1982).

In *Bauder v. State,* 921 S.W.2d 696 (Tex.Crim.App. 1996), this Court held the following under the Texas Constitution's double jeopardy clause:

> [A] second prosecution is jeopardy-barred after declaration of a mistrial at the defendant's request, not only where the objectionable conduct of the prosecutor was intended to produce a motion for a mistrial but also where the prosecutor was aware but consciously disregarded the risk that an event for which he was responsible would require a mistrial at the defendant's request. . . . He is accountable for mis rials properly granted by the trial judge when the events making a mistrial necessary were of his own deliberate or reckless doing.

Bauder, supra, at 699. Thus under the Texas Constitution, a retrial is jeopardy-barred not only where the State deliberately provoked the defendant's motion for mistrial (and such motion was granted), but also where the defendant's motion for mistrial was due to reckless behavior on the part of the State (and said motion was granted).

Recently we refused to extend our holding in *Bauder* to a case similar to the present case, *Ex parte Davis*, supra. In *Davis*, applicant contended *Bauder* should apply where a verdict of guilty has been reversed on appeal due, at least in part, to intentional or reckless prosecutorial misconduct. Thus, retrial would be barred under the double jeopardy clause of the Texas Constitution regardless of whether there had been a mistrial or a reversal of conviction on appeal following a completed trial. This Court, however, declined to extend our holding in *Bauder*, limiting it to cases where a mistrial has been granted due to intentional or reckless prosecutorial misconduct.

Applicant, in the present case, does not persuade us that our holding in *Davis* is erroneous or that the traditional remedy of reversal of the conviction on appeal – where an accused's trial has been rendered constitutionally unfair due to prosecutorial misconduct – is insufficient under the Texas Constitution. Accordingly, we hold that the double jeopardy clause of the Texas Constitution does not bar retrial of an accused whose conviction for the same offense has been reversed on appeal, or as the result of a post-conviction writ of habeas corpus proceeding, due to prosecutorial misconduct.[6] [7]

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[6] We note the level of alleged prosecutorial misconduct in the present case is far less than that shown to have occurred in *Ex parte Davis* and in *Cook v. State*. While we do not condone what appears to be an act of deception committed by the prosecutor at the 1989 hearing (*Mitchell I*), we do note that East was called as a witness at applicant's trial and thus applicant had an opportunity to cross-examine East as to the time he last saw the victim alive. Nowhere in the proceedings below is there any indication the prosecutor was aware of Stroud's statement;

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nor was there any indication the Smith County Sheriff's Department intentionally, in bad faith, withheld it. This Court essentially found the two statements, though relevant on the important issue of time of death and having impeachment value, were somewhat equivocal, though we found they should have been furnished to applicant. *Mitchell I*, 853 S.W.2d at 4-5. Given this, it is difficult to accept applicant's assertion the State intentionally or knowingly suppressed evidence it knew would result in applicant's acquittal.

[7] We note further the cases cited by applicant in support of his contention that we should interpret the double jeopardy clause of the Texas Constitution to bar retrial where an accused's conviction has been reversed on appeal due to prosecutorial misconduct involve instances where prosecutorial misconduct was pervasive, intentional and tainted nearly every phase of the trial. *State v. Breit*, 1996 NMSC 67, 122 N.M. 655, 930 P.2d 792 (N.Mex.) (1996); *State v. White*, 354 S.E.2d 324, 329, 85 N.C. App. 81 (N.C.Ct.App. 1987), *aff'd*, 322 N.C. 506, 369 S.E.2d 813 (N.C. 1988). At least one state high court has held retrial to be barred under its state constitution's double jeopardy clause where the prosecution specifically took actions to prejudice the defendant to the point of denying him a fair trial. *Commonwealth v. Smith*, 532 Pa. 177, 615 A.2d 321 (Penn. 1992). Applicant does not demonstrate the existence of pervasive prosecutorial misconduct or intentional prosecutorial actions which were designed to deprive him of a fair trial in the present case.

We further note that most state high courts have declined to interpret their state constitutions so as to bar, on double jeopardy grounds, retrials following reversals due, in whole or in part, to prosecutorial misconduct. *Fugitt v. State*, 253 Ga. 311, 319 S.E.2d 829 (Ga. 1984); *State v. Sage*, 31 Ohio St. 3d 173, 510 N.E.2d 343 (Ohio 1987); *State v. Chase*, 335 N.W.2d 630 (Iowa 1983).

We affirm the judgment of the Court of Appeals.

MANSFIELD, J.

DELIVERED NOVEMBER 19, 1997

EN BANC
KELLER, J., CONCURS IN THE RESULT.

CONCUR BY: MEYERS

CONCUR: CONCURRING OPINION

I concur in the judgment of the Court. Once again somewhat befuddled as to the reasoning behind the majority's holding,[1] I write briefly to express my opinion

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[1] The majority offers a number of reasons which it says supports its holding. The most puzzling of these is the proposition that today's holding is somehow supported by this Court's opinions in *Cook v. State*, 940 S.W.2d 623 (Tex. Crim. App. 1996), *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989), and *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989). Majority op. at 4-5 & fn 3. In *Cook*, the defendant claimed on direct appeal that a retrial should be barred because the prosecutorial misconduct would unfairly taint retrial under due process principles. Although a double jeopardy claim was mentioned, the Court never addressed how jeopardy principles might be implicated in such situation and appears to have disposed of the issue only by addressing the due process claim. *Cook*, 940 S.W.2d at 628. Appellant presented a similar due process argument in support of his claim that retrial should be barred in this case, but we specifically declined to grant review of those grounds. See fn. 2, infra. While *Adams* and *Brandley* also involved prosecutorial misconduct, no claim of double jeopardy was made in those cases. In fact, the opinion in *Adams* notes that applicant there was requesting a new trial. *Adams*, 768 S.W.2d at 283 ("in his application for writ of habeas corpus, the applicant presents thirteen grounds to support his request for a new trial"). Although all of these cases involved prosecutorial

that the jeopardy analysis is essentially the same in this case as it was in *Davis v. State*, 1997 Tex. Crim. App. LEXIS 66, No. 495-95 (Tex. Crim. App. Sept. 17, 1997), despite the factual differences between the two cases.

In *Davis, supra,* prosecutorial misconduct came to light during the trial, prompting the defendant to move for a mistrial. The mistrial was denied, although the Court of Appeals determined that it should have been granted. The question presented to this Court was "whether a defendant is entitled to have retrial jeopardy barred after an appellate court determines that his motion for mistrial based on prosecutorial misconduct (whether it be misconduct repugnant to *Kennedy, supra,* or *Bauder v. State*, 921 S.W.2d 696 (Tex. Crim. App. 1996)) was erroneously denied." *Davis,* slip op. at 2 (Meyers, J., concurring). The holding and reasoning of the majority in Davis is not abundantly clear to me, but in my view jeopardy was not a bar to retrial in the circumstances presented for the following reasons:

> When the State's conduct does not in fact invoke the mistrial, then the defendant gets his right to be tried in a single proceeding by the jury first selected, although admittedly the proceeding has been tainted. Once a proceeding to verdict has occurred, a defendant's double jeopardy rights are not implicated by a mistrial situation. There has not been a mistrial. The fact that there should have been a mistrial is trial error that the defendant can raise on appeal, to which jeopardy principles do not apply.

Davis, slip op. at 7 (Meyers, J., concurring).

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misconduct, they have nothing to say about the issue on which we granted review in this case – a question of double jeopardy.

In the instant case, appellant did not know of the prosecutorial misconduct until after the trial. Clearly, it was too late to move for a mistrial. Appellant obtained a reversal of his conviction pursuant to a post-conviction writ of habeas corpus, and now claims in this pretrial writ that jeopardy should barr his retrial due to the prosecutorial misconduct which tainted his previous conviction. Appellant is wrong for the same reason the defendant in *Davis* was wrong – the prosecutorial misconduct did not result in a loss of the rights protected by the double jeopardy clause. Unfair as it may seem, double jeopardy does not bar retrial when the prosecutorial misconduct did not actually lead to a mistrial. It matters not whether the mistrial did not take place because the defendant's motion for mistrial was erroneously denied (*Davis*) or because the prosecutorial misconduct was not discovered until after the trial (the instant case). In either case, the defendant's right to be tried in a single proceeding by the first jury selected was not abridged due to the State's misconduct.[2]

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[2] A defendant is not without options when no mistrial has, for whatever reason, resulted from the alleged misconduct. He can still seek a reversal of his conviction based on the misconduct, as appellant did here, pursuant to a post-conviction writ of habeas corpus. See *Mitchell, supra*; see also *Ex parte Kimes*, 872 S.W.2d 700 (Tex. Crim. App. 1993) (claim that prosecutor violated applicant's right to due process by failing to turn over *Brady* material was cognizable in post-conviction application for writ of habeas corpus). If the State elects to retry him after that reversal, and he is convicted, he may claim on appeal that his second trial was so tainted by the misconduct that it was unfair. He may also attempt to claim in a pretrial writ of habeas corpus that a retrial would not be fair on due process grounds because it would be tainted by the misconduct.

The Court of Appeals, although only mentioned in a footnote by the majority today, concluded appellant's double jeopardy rights were not implicated because he was not denied his right to be tried by a particular tribunal. The Court of Appeals got the issue exactly right, even without the benefit of *Davis*.

I agree the judgment of the Court of Appeals should be affirmed.

MEYERS, J.

Delivered November 19, 1997

DISSENT BY: BAIRD

DISSENT:
DISSENTING OPINION ON APPLICANT'S PETITION FOR DISCRETIONARY REVIEW

The State contends the protections against double jeopardy do not guarantee a trial free from prosecutorial misconduct. (State Prosecuting Attorney's Brief at 12.) Specifically, the State argues that "it is not enough to show that the State engaged in the misconduct intending to avoid an acquittal." Id., at 16. Under the State's argument, the only way for the double jeopardy protections to bar retrial is to show "that the State engaged in the

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Appellant presented such argument in grounds for review five and six of his petition for discretionary review, but those grounds were not granted. It may be that a pretrial writ is not an appropriate vehicle by which to raise such due process claims since arguably the issue could [be] resolved on appeal after the retrial. See GEORGE E. DIX, ROBERT O. DAWSON, 43 TEXAS PRACTICE § 47.61 (1995 ED.).

misconduct intending to avoid an acquittal by terminating the proceedings short of disposition by the court or jury." Ibid. (Emphasis in original.) The majority accepts this argument, stating: "Where the prosecutor's actions are engaged in with the intent to persuade the factfinder to convict, instead of acquit, there is no double jeopardy violation under the Fifth Amendment. This is true even if the conviction is due in part to reversible errors, including intentional misconduct on the part of the State." Ante at 1997 Tex. Crim. App. LEXIS 92, *12-13.[1] I cannot agree. Believing the United States and Texas Constitutions should bar retrial based upon prosecutorial misconduct, regardless of whether the proceedings reached a verdict, and irrespective of whether the misconduct was amenable to immediate discovery or covert and discoverable only after trial, I dissent.

I.

The beliefs I hold regarding this issue were stated recently in *Ex parte Davis*, 1997 Tex. Crim. App. LEXIS 66, S.W.2d (Tex.Cr.App. No. 495-95, delivered September 17, 1997) (BAIRD, J., dissenting). However, I write in this case to again address the serious legal flaw the majority makes. The majority would have us believe because applicant fails to direct us to a United States Supreme Court case on point, he loses. Ante at 1997 Tex. Crim.

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[1] All emphasis is supplied unless otherwise indicated.

App. LEXIS 92, *12-13. We have never held that as the legal standard in this Court.[2] The inquiry into whether our State Constitution provides greater protection than its Federal counterpart is no easy task and the resolution of such an issue should not be taken lightly. This Court's duty as final interpreter of the State Constitution demands more from us, and we should not shirk our responsibilities simply because there is no case on point. See, *Crittenden v. State*, 899 S.W.2d 668, 677 (Tex.Cr.App. 1995) (BAIRD, J., dissenting).

The majority argues "that most state high courts have declined to interpret their state constitutions so as to bar, on double jeopardy grounds, retrials following reversals due, in whole or in part, to prosecutorial misconduct." Ante at 1997 Tex. Crim. App. LEXIS 92, *19, n. 7. For this proposition, three cases are cited. Ibid. However, at least five states have held their constitutions do bar retrial after reversal for prosecutorial misconduct. See, *State v.*

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[2] This Court has held the Texas Constitution provides greater rights than the United States Constitution in at least four cases. See, *Bauder v. State*, 921 S.W.2d 696 (Tex.Cr.App. 1996); *Autran v. State*, 887 S.W.2d 31 (Tex.Cr.App. 1994); *Richardson v. State*, 865 S.W.2d 944 (Tex.Cr.App. 1993); and, *Heitman v. State*, 815 S.W.2d 681 (Tex.Cr.App. 1991). See also, *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 402 (Tex. 1988) (We are free to read our own Constitution more broadly than the Supreme Court reads the Federal Constitution, or to reject the mode of analysis used by the Supreme Court in favor of a different analysis of its corresponding constitutional guarantee.) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S. Ct. 1070, 1077, 71 L. Ed. 2d 152 (1982)); and, *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986) (The Texas Bill of Rights affords protection beyond that provided by the United States Constitution.).

Smith, 532 Pa. 177, 615 A.2d 321 (Pa. 1992) (The double jeopardy clause of the Pennsylvania Constitution prohibits retrial not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.); *State v. Breit*, 1996 NMSC 67, 930 P.2d 792, 122 N.M. 655, (N.M. 1996) (Retrial is barred under New Mexico Constitution when improper official conduct is so unfairly prejudicial that it cannot be cured by means short of a mistrial or motion for new trial.); *State v. Colton*, 234 Conn. 683, 663 A.2d 339 (Conn. 1995) (Retrial is barred if the defendant proves the State engaged in prosecutorial misconduct undertaken with the deliberate purpose of depriving the defendant of his double jeopardy protections.); *Collier v. State*, 103 Nev. 563, 747 P.2d 225 (Nev. 1987) (The *Oregon v. Kennedy* exception has also been extended to cases in which the motion for mistrial was denied and the judgment was subsequently reversed because of the prosecutorial misconduct which precipitated the motion for mistrial.); *State v. Cochran*, 51 Wash. App. 116, 751 P.2d 1194 (Wash.App. 1988) (Although the *Oregon v. Kennedy* rule generally applies to mistrials, the exception should apply with equal weight to appellate reversals resulting from prosecutorial misconduct.).

Further, a majority of the federal circuits agree that certain narrowly defined acts of prosecutorial misconduct may bar retrial after appellate reversal. See, *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982); *United States v. Doyle*, 121 F.3d 1078 (7th Cir. 1993); *United States v. Wallach*, 979 F.2d 912 (2nd Cir. 1992); *United States v. Quinn*, 901 F.2d

522 (6th Cir. 1990); *United States v. Singer*, 785 F.2d 228 (8th Cir. 1986); *United States v. Curtis*, 683 [*29] F.2d 769 (3rd Cir. 1982); and *United States v. Rios*, 637 F.2d 728 (10th Cir. 1980).

In the instant case, the hidden malfeasance of the State was not discovered until years after applicant's trial. Therefore, applicant could not have requested a mistrial based upon prosecutorial misconduct. A rogue prosecutor or inept jurist should never be able to deny applicant his constitutional guarantees. See, *Davis, supra; Cook v. State*, 940 S.W.2d 623, 629 (Tex.Cr.App. 1996) (BAIRD, J., concurring and dissenting opinion).

III.

It is no inconsequential matter that the United States Constitution begins: "We the People of the United States, in Order to form a more perfect Union, establish Justice. . . . " The goal of our judicial process should be fairness, not falsehoods. The people of Texas deserve prosecutors who seek justice, not unjust convictions. In a democracy, when justice is denied to some, it is denied to all. If our Constitutional rights are to remain secure, they must be preserved. It is not popular but it is our duty.

With these comments, I dissent.

BAIRD, Judge

Overstreet, J., joins this opinion.

(Delivered November 19, 1997)

En banc

APPENDIX B

OPINION OF THE TWELFTH COURT OF APPEALS OF TEXAS
[1996]

ANDREW LEE MITCHELL, APPELLANT v. THE STATE OF TEXAS, APPELLEE

NO. 12-96-00211-CR

COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER

963 S.W.2d 532; 1996 Tex. App. LEXIS 4208

September 11, 1996, delivered

September 11, 1996, Opinion Filed

PRIOR HISTORY:

APPEAL FROM THE 114TH JUDICIAL DISTRICT COURT OF SMITH COUNTY, TEXAS, Kent. Hon. Cynthia, Judge.

DISPOSITION: Affirmed

COUNSEL: BOTSFORD, DAVID L., AUSTIN, TX, for appellant.

MARTY, EDWARD J., TYLER, TX, for appellee.

JUDGES: Chief Justice Tom B. Ramey, Jr., Justice Charles R. Holcomb, Justice A. Roby Hadden

OPINION: PER CURIAM

This appeal arises from the trial court's order of July 11, 1996 denying Appellant, Andrew Lee Mitchell, the relief sought in his pretrial petition for writ of habeas corpus ("Petition"). In that Petition, Appellant asserted six different grounds that he believed barred his retrial.

After a three-day pretrial hearing on Appellant's Petition and other pending motions, the trial court granted the writ but denied the Petition. The trial judge made no findings of fact or conclusions of law in support of her ruling. Thereafter, pursuant to TEX. R. APP. P. 44, Appellant appealed the trial court's denial of his petition raising seven points of error. We will affirm.

I. BACKGROUND

In December of 1979, Keith Wills was found shot to death in his fireworks stand; a cigar box containing from $100 to $150 in cash was also missing from the stand.[1] In January of 1980, when questioned about unrelated matters, Edward Earl Owens confessed to being at the murder scene of Keith Wills. Thereafter, Tony Mitchell, Appellant's son, also admitted his presence at the murder scene, and he implicated his father as the gunman. The State granted Owens immunity, and promised Mitchell 10 years' probation.

During a three-day trial, both Owens and Mitchell testified as accomplice witnesses. According to their testimony, the shooting took place at approximately 8:30 p.m. on the night of December 26th. Evidence also showed that Appellant was in Tyler at the Alfreda Motel at approximately 10:00 p.m. using heroin bought with the proceeds from the robbery of the fireworks stand. Because the victim's time of death was not established by the pathologist and because no testimony conflicted with

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[1] The proceeds of the fireworks sales were to have been donated to an orphanage in India.

the accomplices' account as to time of death, the State's theory of the case was that the murder was committed before 10:00 p.m. At the conclusion of the trial, Appellant was convicted of capital murder and sentenced to death. He appealed, and the Court of Criminal Appeals affirmed the conviction concluding that the evidence was sufficient to corroborate the accomplice witnesses' testimony. *Mitchell v. State*, 650 S.W.2d 801 (TEX. Cr. App. 1983), *cert. denied*, 465 U.S. 1074, 79 L. Ed. 2d 755, 104 S. Ct. 1431 (1984).

Several years later, *Mitchell* sought post conviction habeas corpus relief raising approximately 124 claims for relief. The Court of Criminal Appeals remanded the case to the 241st District Court of Smith County for an evidentiary hearing, which was ultimately conducted in 1989. At that hearing, it was established that two persons, game warden Ralph East and Deputy Kelly Stroud of the Smith County Sheriff's Office, had both given statements that they had seen a person sitting in the fireworks stand watching television after 10:00 p.m. on the night in question.[2] From the 1989 hearing, it was then determined that the East and Stroud statements had never been turned over to the Smith County District Attorney's office or to the defense. Thus, based on findings from that 1989 hearing, the Court of Criminal Appeals granted Appellant's 115th claim for relief. *Ex parte Mitchell*, 853 S.W.2d 1 (TEX.

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[2] East stated that between 10 p.m. and midnight, he passed the fireworks stand, saw the light on, and saw a person sitting behind the counter. Stroud stated that he passed the stand at approximately 12:15 a.m. when returning to Tyler from Troup, and he saw that the fireworks stand was open and observed one subject wearing a plaid shirt and sitting inside the stand.

Cr. App. 1993), *cert. denied*, 510 U.S. 864, 114 S.Ct. 183, 126 L. Ed. 2d 142. In so doing, the court concluded that suppression of these two exculpatory statements following the defendant's motion for disclosure of all exculpatory evidence in the State's possession "created a probability sufficient to undermine the confidence in the outcome of the instant trial. [citation omitted] Applicant's right to due process by virtue of the Due Process Clause of the Fourteenth Amendment, was violated by the non-disclosure of this evidence." *Mitchell*, 853 S.W.2d at 6. As a result of this decision, Appellant's conviction was vacated, and he was remanded back to the Smith County Sheriff's custody to answer the indictment. Id.

Appellant's retrial has been scheduled for September 12, 1996. During preparation for pretrial matters in July of 1996, Assistant District Attorney David Dobbs found in the State's file, a page of handwritten notes from Mike Patterson, the prosecutor at the first trial in 1981. Those notes revealed that prior to the first trial, Patterson did have knowledge of Ralph East's statement that East had seen the victim alive after midnight on the night in question. Additionally at the July 1996 hearing, Frank Henderson, the Smith County Assistant District Attorney who participated in the 1989 evidentiary hearing, testified that he had no recollection "now" of having remembered seeing Patterson's note regarding Ralph East back at the 1989 hearing. Henderson further admitted that despite Judge Tunnell's order that the State's file from the first trial be sealed and forwarded to the Court of Criminal Appeals, the State had not done so. On cross-examination, however, Henderson stated that in 1989, he was the

person who found Kelly Stroud's report and after discussing it with District Attorney Jack Skeen, he had turned that report over to the defense. He further stated that he had never intentionally withheld any information from the defense during that 1989 hearing.

Hunter Brush, the District Attorney at the time of the first trial, was questioned with regard to the Stroud-East statements and other matters surrounding the first trial. He, however, had no recollection of any significant details. In fact, he did not appear to remember that he had actually participated in the first trial. Brush, however, did testify that if he had known of the Stroud-East statements, he would have pursued indictments against Owens and Tony Mitchell.

Walter Woodhull, an investigator for the Smith County Sheriff's office at the time of Wills' death,[3] testified that Dr. Gonzalez, the pathologist, had refused to perform tests that Woodhull had requested, which would have determined the time of Wills' death. Woodhull testified that during the autopsy, he noticed that Gonzalez was not performing these tests, and he questioned Gonzalez about it. With respect to that confrontation, he testified:

> We argued at the time, but not very much, because he was the boss in that room . . . He just kind of blew it off and said we don't do that.

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[3] Woodhull and his wife Chantal had previously been employed by Hunter Brush as investigators for the Smith County District Attorney's office. However, they left employment there following discontinuance of the grant money budgeted for those positions.

> And I informed him that where I had come from, all of the coroners did do that. But he said they didn't do it here, and that was it.

Woodhull also testified to a variety of omissions in his investigation of the Wills' shooting, which by his own admission, were not good investigative procedure. On cross-examination, however, he stated that none of these procedures were intentionally omitted to deprive Appellant of a fair trial.

Chantal Woodhull was also an investigator with the Smith County Sheriff's Office at the time of Wills' death. At the July 1996 hearing, she testified that she had had a typed copy of Kelly Stroud's statement and that she had discussed the content of that statement with Jim Walker, and possibly Mike Patterson, the two prosecutors in the *Mitchell* case.

Following two additional witnesses, the pathologist, V.G. Gonzalez, testified that during the autopsy, he was never asked to conduct a test to determine the time of Keith Wills' death. He further stated that had such a test been requested, it would have been conducted. He further stated that he had never, in any case, refused to conduct a test to determine time of death.

This significant additional testimony introduced at the 1996 hearing was considered by the trial court at the time she denied the merits of Appellant's Petition.

II. PREFACE TO APPELLANT'S ARGUMENTS ON APPEAL

On appeal, Appellant asks this Court to overturn the trial court's denial of his Petition and enter an order barring his re-prosecution for the shooting death of Keith Wills. In support of his appeal, Appellant presents six points of error, which he claims bar his retrial.[4] The first four points of error have as their foundation the Double Jeopardy Clauses of the Texas and United States Constitutions, while points five and six stem from the state and federal Due Process/Due Course of Law Clauses.

In Appellant's 70 page brief, he devotes extensive time to the facts giving rise to his jeopardy and due process claims. Because, however, we believe that the resolution of his points of error do not turn on facts, but upon interpretation of existing law, we will not devote significant time to a discussion of the facts before us. Instead, for purposes of addressing Appellant's points of error, we will assume without deciding that as a result of the July 1996, pretrial hearing in this case, intentional prosecutorial misconduct was shown.

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[4] Appellant also raises a seventh point of error pertaining to the accelerated briefing schedule set by this Court. That point will be addressed last.

III. APPELLANT'S STATE AND FEDERAL DOUBLE JEOPARDY CLAIMS

A. STANDARD OF REVIEW

Citing *U.S. v. Arreola-Ramos*, 60 F.3d 188 (5th Cir. 1995), Appellant asserts that in the pretrial habeas corpus context, the standard of review of a double jeopardy claim is de novo. In that case, the court stated: "Double jeopardy raises a legal issue of constitutional dimensions; we review de novo the denial of a motion to dismiss on double jeopardy grounds." *Id.* at 191. Although the State has not challenged this federal standard of review, in Texas, we note that an appeal from the denial of pretrial habeas corpus relief sought on double jeopardy grounds must be reviewed under the "clearly erroneous" standard of review. *Ex parte May*, 852 S.W.2d 3 (TEX. App. – Dallas 1993, pet. ref'd). In *May*, the court stated:

> We look to the record to see if the record leaves us with the definite and firm conviction that the trial court made a mistake. [citation omitted] The clearly erroneous standard accords great deference to the trial court's findings and conclusions. This is so because the trial court bases its rulings in part upon a credibility determination that is not reviewable by the appellate court. [citation omitted] We view the evidence in the light most favorable to the trial court's ruling. [citation omitted].

Ex parte May, 852 S.W.2d at 5. Although we perceive that the result under either of these standards of review would be the same, we will apply the higher de novo standard to Appellant's four double jeopardy points of error.

B. ALLEGED VITIATION OF APPELLANT'S RIGHT UNDER STATE AND FEDERAL LAW TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL

By his first point of error, Appellant alleges that because the State of Texas engaged in intentional misconduct, Appellant's retrial is barred under the Double Jeopardy Clause of the Fifth Amendment to the UNITED STATES CONSTITUTION made applicable to the States by the Fourteenth Amendment. Appellant argues that under the Double Jeopardy Clause, he has the right to have his trial completed by a particular tribunal and that this right was violated because of misconduct on the part of the State.

Given the apparent misconduct and omissions of certain county officials and employees, at first blush, this argument is very seductive. However, a careful review of controlling case law causes us to conclude that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not preclude retrial of Appellant's case.

Ordinarily, an accused invokes his right to be tried by a particular tribunal after he has been forced by the prosecution into moving for mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). Generally, a defendant's successful motion for mistrial will not bar a retrial; however, *Kennedy* establishes a very narrow exception to that rule: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after

having succeeded in aborting the first on his own motion." *Kennedy*, 102 S. Ct. at 2089.

The Court, however, prefaced this holding with the following reasoning that places this narrow exception in perspective. First, it noted that the Double Jeopardy Clause does not offer a defendant a guarantee that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. *Kennedy*, 102 S.Ct. at 2087. Second, this exception is designed to prevent an accused from being unduly harassed into moving for mistrial because the prosecution is unhappy with the present tribunal, and hopes for a better one in the future.

> A defendant's motion for a mistrial constitutes "a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." [citation omitted] Where prosecutorial error even of a degree sufficient to warrant a mistrial has occurred, "the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." [citation omitted]. (emphasis added).

Kennedy, 102 S. Ct. at 2089.

In *United States v. Dinitz*, 424 U.S. 600, 611, 96 S. Ct. 1075, 1081, 47 L. Ed. 2d 267 (1976) (citations omitted) (emphasis added) the Court held that the Double Jeopardy Clause "bars retrial where 'bad-faith' conduct by judge or prosecutor, [citation omitted] threatens the 'harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." In

Kennedy, the court clarified this language to show that a prosecutor's "bad-faith" meant intentional goading. *Kennedy*, 102 S. Ct. at 2089. The highlighted portion of that statement, however, shows why such intentional misconduct bars retrial, i.e., it was intended to cause the defendant to abort the trial, so the prosecution might gain circumstances more likely to produce a conviction on retrial. *United States v. Dinitz*, 424 U.S. 600, 47 L. Ed. 2d 267, 96 S. Ct. 1075, 1081 (1976). Moreover, as noted in *Kennedy*, when the prosecution goads a defendant into moving for mistrial, the accused no longer retains that important primary control over the course of his trial; instead, he is forced to seek a mistrial before a verdict is reached. *Kennedy*, 102 S. Ct. at 2089.

Here, unlike *Kennedy*, the prosecutorial misconduct at issue was not discovered until long after completion of the first trial; thus, it was not the type of "*Kennedy* misconduct" which goaded Appellant into seeking a mistrial. Consequently, the Fifth Amendment right *Kennedy*'s holding was designed to protect was not implicated.

Because *Kennedy*'s application is limited to intentional prosecutorial misconduct in the mistrial context, Appellant urges us to adopt the Fifth Circuit's reasoning in *Robinson v. Wade*, 686 F.2d 298 (5th Cir. 1982) which advocates extending *Kennedy*'s bar to cases where prosecutorial misconduct results in a tainted verdict. In that case, the accused had been convicted and sentenced to death three different times for the same offense. After receiving his third reversal and remand for new trial, he sought relief urging that a fourth prosecution was prohibited under the Double Jeopardy Clause of the Fifth Amendment to the UNITED STATES CONSTITUTION. In

addressing the question, the Fifth Circuit acknowledged that *Kennedy* only barred retrial following intentional prosecutorial overreaching in the mistrial context; however, it opined that in the future, the doctrine might and probably should be extended to prosecutorial misconduct not discovered until after trial. *Robinson v. Wade*, 686 F.2d 298, 306-308 (1982). Ultimately, however, the Fifth Circuit decided that the district court below had not erred in finding that the prosecutorial conduct complained of was not intentional. Therefore, it concluded that it need not decide whether it would extend the reasoning in *Kennedy* to the case before it. *Robinson v. Wade*, 686 F.2d 298, 308 (1982).

While we do not question the sagacity of the Fifth Circuit's reasoning in *Robinson*, it must be noted that nearly fourteen years after the issuance of *Robinson*, the Supreme Court has still not extended *Kennedy*'s narrow holding barring retrial to cases where prosecutorial misconduct results in a tainted verdict. Until it does so, we must decline to adopt the reasoning so eloquently expressed but so neatly side-stepped in *Robinson*.[5]

Having determined what type of error the instant case does not present, it is now incumbent upon us to specify what kind of error such prosecutorial misconduct

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[5] Appellant also urges us to consider the law of several other jurisdictions that have barred retrial of cases where prosecutorial misconduct has led to a tainted verdict. Without individually addressing each of those cases, suffice it to say that we decline to adopt their reasoning as it tends to stretch the Double Jeopardy Clause beyond the boundaries currently established by United States Supreme Court holdings.

does present. Despite the fact that Appellant has cleverly presented the State's misconduct in the context of a pre-trial habeas corpus proceeding, the prosecutorial misconduct complained of really appears to be a routine due process violation like that dealt with in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and many other cases like it. In *Brady*, as here, the appellant had been sentenced to death. However, after discovering that the State had wrongfully suppressed an important exculpatory statement made by the accomplice witness, he sought post-conviction relief. After examining the case, the Supreme Court stated: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 1196-1197, 10 L. Ed. 2d 215 (1963). Having concluded there was a due process violation, the court awarded appellant a new trial on punishment since the suppressed exculpatory evidence pertained to a punishment issue. Before making its ruling the court, however, noted:

> The principle of *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935)[6] is not

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[6] In *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L. Ed. 791 (1935) the Court stated:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony

> punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963).

This principle still exists today. In *Kennedy*, the Court noted that if a trial court were to improperly deny a motion for mistrial on grounds of prosecutorial goading, the remedy on appeal for such error would be a new trial, and not a bar of re-prosecution. *Kennedy*, 102 S.Ct. at 2090. Although the efficacy of this logic has been a subject of criticism, it is, nevertheless, the law at this time. See *Robinson v. Wade*, 686 F.2d 298, 307 (1982).

Thus, having found no authority that would bar Appellant's re-prosecution on grounds that he had been denied his right to be tried by a particular tribunal under the Double Jeopardy Clause of the Fifth Amendment to the UNITED STATES CONSTITUTION, we hold that the trial court did not err in denying Appellant's petition on that basis. Moreover, we decline Appellant's invitation to pioneer such an interpretation of the Double Jeopardy Clause. Appellant's first point of error is overruled.

> known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

By his second point of error, Appellant urges that because of the State's misconduct, his re-prosecution should have been barred under the Double Jeopardy Clause of the TEXAS CONSTITUTION.[7] In support of his position, Appellant directs our attention to the Court of Criminal Appeals' recent decision in *Bauder v. State*, 921 S.W.2d 696 (Tex. Cr. App. 1996). In *Bauder*, the court interpreted this state's Double Jeopardy Clause as requiring that a successive prosecution be barred under slightly broader circumstances than those set forth by the Supreme Court in *Kennedy*. In so doing, the Court of Criminal Appeals stated:

> Unlike the Supreme Court, we do not think the prosecutor's specific intent is a relevant aspect of the inquiry . . . We therefore hold that a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request, not only when the objectionable conduct of the prosecutor was intended to induce a motion for mistrial, but also when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request.

Bauder, 921 S.W.2d at 699.

Except for this difference in the prosecutor's scienter, the *Bauder* and *Kennedy* tests appear to be the same.

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[7] Article I, Section 14 of the TEXAS CONSTITUTION provides in pertinent part: "no person, for the same offense shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."

Further, like *Kennedy, Bauder* makes no attempt to bridge the gap between prosecutorial misconduct resulting in a mistrial and prosecutorial misconduct resulting in a tainted verdict. What is undoubtedly clear, however, is that *Bauder*, like *Kennedy*, speaks solely to prosecutorial misconduct in the mistrial context. In fact, almost an entire page of the *Bauder* opinion is spent describing the rarity of *Bauder* error, and the particular mistrial context under which it would bar re-prosecution. *Bauder*, 921 S.W.2d at 698.

Given that *Bauder*'s application is specifically limited to prosecutorial misconduct in the mistrial context, we decline to extend its reasoning to the instant case. Such an application of *Bauder* would require us to take a greater leap in interpreting our state's Double Jeopardy Clause than appears to be warranted under current case law. While under Heitman[8], the Court of Criminal Appeals may choose to interpret our Double Jeopardy Clause to bar retrial under circumstances like those present here, under existing law, we cannot do so. Accordingly, Appellant's second point of error is overruled.

C. ALLEGED VITIATION OF HIS RIGHT UNDER FEDERAL AND STATE LAW TO BE FREE FROM SUCCESSIVE PROSECUTIONS

By his third point of error, Appellant alleges that but for the State's misconduct, the evidence against him at the first trial was insufficient as a matter of law to convict him; consequently, he alleges that the trial court erred in

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[8] *Heitman v. State*, 815 S.W.2d 681 (Tex. Cr. App. 1991).

denying his petition based upon his right under the Fifth Amendment to the UNITED STATES CONSTITUTION against twice being put in jeopardy. Appellant's fourth point of error alleges the same violation under the Double Jeopardy Clause contained in Article I, Section 19 of the TEXAS CONSTITUTION. Because Texas employs the same standard for legal sufficiency of the evidence as set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), we will address these points together. *See Jones v. State*, 833 S.W.2d 118, 122 (Tex. Cr. App. 1992), *cert. denied*, 507 U.S. 921, 113 S. Ct. 1285, 122 L. Ed. 2d 678 (1993).[9]

By these points of error, Appellant, without citing any authority entitling him to it, seeks review of the legal sufficiency of the evidence from the first trial; he, however, asks that all of the evidence including that wrongfully suppressed by the State be considered to determine whether there was legally sufficient evidence to sustain a conviction at the first trial. These points are without merit for several reasons.

First, even under the guise of double jeopardy, challenges to the sufficiency of the evidence are not properly reviewed in a habeas corpus proceeding when the law affords a remedy by appeal. *See Ex parte Williams*, 703

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[9] The standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781, 2789 (1979) requires that the reviewing court view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jones v. State*, 833 S.W.2d 118, 122 (1992).

S.W.2d 674 (Tex. Cr. App. 1986). Here, Appellant has already had an opportunity to challenge the legal sufficiency of the evidence introduced at his first trial, and will have another opportunity, if necessary, to do so following retrial.

Second, despite the State's wrongful suppression of Stroud and East's statements, these statements are nevertheless not yet "evidence" admitted at any trial. Thus, at this juncture, their inclusion would not be proper in a legal sufficiency analysis. Third, Appellant has already obtained a new trial, as requested, on the basis that these statements might undermine confidence in the outcome of the original trial. In *Ex parte Mitchell*, the Court of Criminal Appeals reviewed the evidence from the first trial in conjunction with that from the 1989 evidentiary hearing. As a result of that review, it determined that Stroud and East's statements were exculpatory evidence and that failure to disclose them "created a probability sufficient to undermine the confidence in the outcome of the instant trial." *Ex parte Mitchell*, 853 S.W.2d at 6. Thereafter, it sustained Appellant's 115th claim for relief and as requested,[10] Appellant was remanded to the Smith County Sheriff's to answer the indictment, this time, armed with the Stroud and East statements. Thus, Appellant has already received the relief he requested for the wrongful suppression of this evidence. It now remains for

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[10] At the conclusion of his 115th claim for relief, Appellant stated: "A new trial is appropriate and mandated because Applicant did not receive a fair trial at guilt/innocence or at punishment or a fair appeal due to the suppression of evidence by the State."

a jury to determine the effect these statements will have on his guilt or innocence.

Finally, as the State points out, even if we were to engage in the requested review using the *Jackson v. Virginia* standard of review, Appellant would not prevail. Under *Jackson* since we are required to review the evidence in the light most favorable to the verdict, this test would require that we presume a jury had convicted Appellant.[11] Thus, because of this presumed conviction, we would again have to presume that since the jury chose to convict Appellant, it must have believed the accomplices' testimony as to when the shooting occurred rather than the evidence produced by Stroud and East. TEX. CODE CRIM. PROC. 38.04 (Vernon 1979); see *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Cr. App. 1986) (on motion for rehearing), *cert. denied*, 488 U.S. 872, 102 L. Ed. 2d 159, 109 S. Ct. 190 (1988) (holding that once competent evidence is presented, it is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony). Finally, as noted above, the Court of Criminal Appeals already determined in *Mitchell v. State* that "the evidence independent of the accomplice witnesses tends to connect the appellant with the crime charged and is sufficient to corroborate the accomplice witnesses' testimony." 650 S.W.2d 801, 808. Since independent "time of death" evidence was not used to corroborate the accomplices' testimony, Stroud and East's statements do not undermine the independent evidence used to corroborate the accomplices' testimony in

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[11] The State is not entitled to appeal from a verdict of acquittal. TEX. CODE CRIM. PROC. 44.01.

the first appeal. Consequently, the Court of Criminal Appeals' holding that the accomplice witnesses testimony was sufficiently corroborated is unaffected by the Stroud-East statements.

While the addition of East and Stroud's statements to the evidence adduced at the first trial might cause a reversal under a factual sufficiency challenge, *Clewis v. State*, 922 S.W.2d 126 (Tex. Cr. App. 1996) under a legal sufficiency challenge, the verdict would have to be upheld.[12] For these reasons, Appellant's third and fourth points of error are overruled.

IV. APPELLANT'S STATE AND FEDERAL DUE PROCESS CLAIMS

In his fifth point of error, Appellant alleges that the trial court erred in refusing to bar his retrial because the State's investigation and first trial abrogated his right to due process of law as guaranteed by the Due Process Clause of the Fourteenth Amendment to the UNITED STATES CONSTITUTION. By his sixth point of error, Appellant alleges that he has suffered this same type of harm through violation of his rights to Due Course of Law and Equal Protection under Article I, Sections 13 and 19 of the TEXAS CONSTITUTION.

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[12] *Clewis v. State*, 922 S.W.2d 126 (Tex. Cr. App. 1996) authorizes an appellant to challenge the factual sufficiency of the evidence on appeal; however, unlike a successful challenge to the legal sufficiency of the evidence which results in an acquittal, a successful *Clewis* challenge results only in the granting of a new trial.

Unfortunately, these points are not appropriate for review in a pretrial habeas corpus proceeding; therefore, we will not address them. A petition for pretrial writ of habeas corpus is an extraordinary remedy that should not be entertained when there is an adequate remedy by appeal after final judgment; it is not a substitute for an appeal. *Ex parte Gonzales*, 667 S.W.2d 932, 935 (Tex. App. – Austin 1984, pet. ref'd). While exceptions have been made where double jeopardy, bail, and the validity of a penal statute have been raised, none has been made for due process and equal protection violations. *Ex parte Matthews*, 873 S.W.2d 40, 44-45 (Tex. Cr. App. 1994) (Campbell, J. dissenting); *Gonzales*, 667 S.W.2d at 935; accord *Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir.1995). The types of violations alleged by Appellant, regardless of the facts, simply do not bar retrial at this time; instead, his remedy is a new trial.[13] Accordingly, points of error five and six are overruled.

V. APPELLANT'S CHALLENGE TO THIS COURT'S ACCELERATED SUBMISSION SCHEDULE

By his seventh and final point of error, Appellant alleges that the accelerated appeal ordered by this Court (dated August 8, 1996) granted on the basis of the State's misrepresentation of Appellant's requested relief, may deny him a full and fair hearing of his claims for relief in

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[13] The principal case upon which Appellant relies as support for his position is *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Cr. App. 1989). As did the instant case, *Brandley* resulted in applicant's conviction being set aside and his remand to the sheriff to face the indictment on which he was convicted.

violation of his rights to due process and equal protection under the Fourteenth Amendment of the UNITED STATES CONSTITUTION and Article I, Sections 13 and 19 of the TEXAS CONSTITUTION. This final point of error is not only multifarious, it places this Court in the admittedly awkward position of having to review the propriety of one of its prior rulings. Nevertheless, we will address it.

A. BACKGROUND

On July 30, 1996, Appellant filed with this Court his emergency motion to stay the trial set for September 5, 1996, pending interlocutory appeal of the trial court's order denying him relief under his Petition. His interlocutory appeal was filed pursuant to Tex. R. App. P. 44.[14] The first 10 pages of that 59-page motion dealt with the request for an emergency stay. The remaining pages, however, presented a tentative brief and overview of the

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[14] After establishing accelerated deadlines for filing the record, Rule 44(a) provides in relevant part:

> The appellate court may shorten or extend the time for filing the record if there is a reasonable explanation for the need for such action. When the record is received by the appellate court, the court shall set the time for the filing of briefs, if briefs are desired, and shall set the appeal for submission.

Rule 44(b), which speaks to submission of the case, provides in relevant part: "Such cases, taken to the court of appeals by appeal, shall be heard at the earliest practicable time . . . The only design of the appeal is to do substantial justice to the party appealing."

six points of error this Court could probably expect to be raised in Appellant's brief. Before the court ruled on the emergency motion, the State filed a response requesting that we set accelerated briefing deadlines and attempt to determine the appeal prior to the September trial setting. In support of its response, the State asserted that this case had been awaiting retrial since 1993, and if the current trial schedule were bypassed as a result of this appeal, it would be unlikely that the case could again be set for trial before 1997. Appellant replied, again requesting that we stay the trial.

Thereafter, on August 8, 1996, this Court entered an order granting the State's request for accelerated submission and stating its intention to deliver an opinion prior to August 30th. In that same order, however, it, stayed further trial court proceedings to protect its appellate jurisdiction. That same day, the court also entered a scheduling order setting accelerated briefing deadlines based upon the assumption stated therein that the statement of facts would be timely filed. On August 12, 1996, however, Appellant filed a motion for extension of time to file the statement of facts and extend the briefing deadlines. On August 13, 1996, after entertaining the motion, this Court withdrew its order of August 8th, granted Appellant's motion for extension on the statement of facts and briefs, and reset oral argument for September 3, 1996.[15] Although the court stated therein that it intended to deliver an opinion prior to September

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[15] The court also lifted the stay to the extent necessary to allow pretrial matters scheduled for August 30, 1996, to proceed.

5, 1996, the trial court thereafter rescheduled its special venire for September 12, 1996, effectively extending the trial date by one week.

B. THE MERITS OF THIS POINT

The court's briefing and submission deadline did not violate Appellant's due process and equal protection rights. In short, the August 8th order about which Appellant complains was withdrawn by this Court on August 13, 1996, and at Appellant's request, the deadlines for the record, briefs, and consequently, arguments were extended. We additionally note, however, that in his July 30th emergency motion for stay, Appellant displayed his readiness to proceed with the appeal by presenting this Court with a tentative 49-page brief propounding six proposed points for review. Thereafter, following the court's withdrawal of the complained-of August 8th order and the granting of Appellant's requested extensions on the statement of facts and briefs, Appellant timely filed his 70-page brief raising those six points of error. Following the State's timely filing of its brief, this Court granted Appellant leave to file a 20-page reply brief. Thereafter, at arguments on September 3, 1996, this Court gave Appellant the full amount of time he requested for argument, and thereafter, it extended that time freely upon Appellant's request during both his initial argument and rebuttal.

Additionally, this Court's order stating that it intended to deliver an opinion before September 5, 1996, was merely a tentative pronouncement. Nothing better illustrates the tentative nature of that date than the fact

that September 5th has already passed without this Court's delivery of an opinion in this case. Further, Appellant's concerns about the voluminous record before us are likewise without merit. As noted above, although factually intensive, the issues raised by this appeal turn on legal doctrines rather than fact-based issues. Consequently, this Court has not been burdened with setting forth all of the particulars of this voluminous record in its opinion.

Appellant having, in this Court's view, been given the full and fair review to which he was entitled under law, we overrule his seventh and final point of error.

VI. CONCLUSION

It must be said that while we were moved by the disturbing facts of this case, we nevertheless must conclude that under the points of error presented, Appellant's retrial is not barred. His remedy under both the Texas and United States Constitutions, however, lies in a new trial. Although some may consider this an inadequate solution, it must be remembered that Appellant's rights are to be placed in the balance with those of society. As Justice Cardozo wrote: "Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 122, 78 L. Ed. 674, 54 S. Ct. 330, 338 (1934). The principal goal, after all, is not to punish society for the misdeeds of the prosecution but to obtain a fair criminal trial for the accused.

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963).

For the reasons stated herein, we affirm the trial court's order denying Appellant's Petition.

Opinion delivered September 11, 1996.

Panel consisted of Ramey, Jr., C.J., Halcomb, J., and Hadden, J.

APPENDIX C

OPINION OF COURT OF CRIMINAL APPEALS OF TEXAS [1993]

EX PARTE ANDREW LEE MITCHELL

No. 71,474

COURT OF CRIMINAL APPEALS OF TEXAS

853 S.W.2d 1; 1993 Tex. Crim. App. LEXIS 37

February 10, 1993, Delivered

PRIOR HISTORY:

Habeas Corpus Application from SMITH County.

COUNSEL: For Applicant: David L. Botsford, Austin, Tx.

For State: Jack Skeen, Jr., D. A. & Ann M. Monaco, Asst. D. A., Tyler, Tx., Robert Huttash, State's Attorney, Austin, Tx.

JUDGES: En Banc. White, Judge, Maloney, Judge not participating

OPINION BY: WHITE

OPINION: OPINION

This is an application for writ of habeas corpus that was transmitted to this Court pursuant to the provisions of TEX.CODE CRIM.PROC.ANN.Art. 11.07. This Court abated the matter and ordered the trial court to hold an evidentiary hearing and to transcribe the voir dire of applicant's trial. The trial court held two weeks of evidentiary hearings, and then made findings of fact and

conclusions of law. The completed record was then transmitted to this Court, along with the trial court's recommendation that all relief be denied.

This Court set the application for submission to decide whether applicant's right to due process was violated by the State's suppression of exculpatory and material information which was within its possession. U.S.CONST. AMEND. XIV. This Court finds that the suppressed statements of Ralph East and Kelly Stroud were both exculpatory and material. Accordingly, we grant relief.

In February, 1981, applicant was convicted of committing the capital murder of Keith Wills on December 26, 1979. TEX.PENAL CODE ANN. § 19.03(a)(2). This Court affirmed the conviction on direct appeal. *Mitchell v. State, 650 S.W.2d 801 (Tex.Cr.App. 1983).* At trial, the State proved, mostly through the testimony of applicant's two accomplices[1], that Keith Wills was murdered at approximately 9:00 p.m. on the 26th. The accomplices testified that sometime around 8:30 p.m. on the night of December 26th, applicant, Owens and Mitchell went to a fireworks stand on Highway 110 between Troup and Tyler where Wills was working the night shift. While Owens remained at their car, applicant and his son went to the fireworks stand. According to the accomplices, applicant shot Wills

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[1] According to the State's theory at trial, applicant committed the robbery-murder of Keith Wills while in the company of Edward Owens and Anthony Mitchell, applicant's son. Owens and Mitchell both testified for the State. In return Owens received a grant of immunity and Mitchell received a promise of ten years' punishment, probated.

twice in the head at close range during the course of the robbery. The three men then disposed of some of the property taken in the robbery on their way to applicant's residence. After leaving the residence, the three men went to the Savoy Club and Alfredia Motel in Tyler. According to Owens, they arrived there at approximately 10:00 p.m. Applicant then went to his room at the Alfredia Motel where he took some heroin. According to the evidence at trial, applicant remained there the rest of the night and into the next morning.

On direct appeal, applicant contended there was insufficient evidence to corroborate the accomplice witness testimony. This Court found the following corroboration was sufficient: the independent evidence showed the accomplices and applicant were together shortly before and after the alleged time of the commission of the murder; this testimony placed the three men in the vicinity of the fireworks stand; the bullet fragments removed from the deceased were fired from a .38 calibre weapon (the accomplices testified applicant shot Wills with a .38 calibre weapon that had a tendency to misfire); a witness stated that he saw a .38 calibre handgun in applicant's bedroom a few weeks after the murder; and the medical examiner, Dr. Gonzalez, testified that Wills was shot between the eyes (Owens testified that applicant told him that he shot Wills between the eyes). This Court held that this was sufficient evidence to corroborate the testimony of the accomplices Owens and Mitchell. *Mitchell v. State, 650 S.W.2d, at 804-809.* However, there was no corroboration of the accomplices' account of the time of the killing of Wills.

In this habeas action, applicant asserted the State suppressed the testimony of Ralph East, a game warden who worked in Smith County at the time of the robbery-murder, and Kelly Stroud, a deputy sheriff with the Smith County Sheriff's Office. Applicant also argued there is a reasonable probability that the outcome of his trial would have been different if this evidence had not been suppressed. In light of the following facts, we find that we are in agreement with applicant that the statements of East and Stroud were suppressed, in apparent contravention of applicant's pretrial motion for disclosure of all exculpatory evidence in the State's possession.

Ralph East began working as a State Game Warden in Smith County in 1974. On the evening of December 26, 1979, he was on duty near Troup, checking for poachers. Between 10:00 p.m. and midnight, after applicant had arrived at the Savoy Club, East left Troup to drive home on Highway 110. When he passed the fireworks stand where Keith Wills was working, he noticed that the lights in the stand were turned on. "I noticed a light as if it was a television on and a person sitting behind the counter and I just looked at them and continued. That was all." When he testified at the evidentiary hearing, East was unable to identify the man who he saw sitting behind the counter.

On the morning of December 27, 1979, East was with Justice of the Peace Guthrie in her office in Smith County when a man and his son came in to report that there was a dead man at the fireworks stand. East and Judge Guthrie went to the stand to check out the accuracy of the report. Judge Guthrie remained in the car while East examined the scene. "When we got there, I walked up to

the fireworks stand and looked over the counter and viewed the body laying there. . . . I seen a large hole between his eyes." The deceased wore a plaid shirt. East then returned to the car, parked it so that it blocked the driveway up to the fireworks stand, roped off the crime scene, and waited for the Sheriff's Office to arrive.

Deputy Sheriff Woody Woodhull showed up to handle the investigation. At the evidentiary hearing, East testified that he felt confident that he told Deputy Woodhull at the scene what he had seen the night before. "Nor did I talk to anybody except for Woody Woodhull. I feel very confident that I told him what time I was by there the night – on the 26th." At that time, no one requested that East file a written report regarding his observations of the night of the 26th.

After his conversation with Deputy Woodhull on December 27th, no one else connected with applicant's trial ever spoke with East about his observations of the fireworks stand on the night of the 26th. The prosecutor who tried applicant for the capital murder of Keith Wills never spoke with East about what he saw on the night of the 26th. The next time East was asked about what he saw on the 26th was when he spoke with applicant's attorney on this writ application on the day before he testified at the evidentiary hearing. It appears that East's statements to Deputy Woodhull were never disclosed by Woodhull to the prosecutor or to applicant's trial counsel. The question of whether East's statements were exculpatory and material will be answered in the discussion of Kelly Stroud's offense report.

Kelly Stroud was a Deputy Sheriff in Smith County at the time of the capital murder of Keith Wills. In December, 1979, Stroud worked patrol duty for the Smith County Sheriff's Office. On December 26th and 27th, Stroud had the 3:00 to 11:00 p.m. shift. At approximately 10:15 p.m. on the 26th, the Sheriff's Office dispatched Stroud to Troup City Hall to investigate an assault. When he finished that call at 12:10 a.m., approximately three hours after applicant allegedly killed Wills and two hours after applicant arrived at the Savoy, Stroud returned to Tyler on Highway 110. Stroud checked in with dispatch and got a call back and time check of 12:15 a.m. He then made the following observation. "As I drove northbound on 110, I noticed that the fireworks stand was still open and observed one subject sitting inside the stand on the north end but did not notice anything unusual about it." Stroud observed that the man was sitting in a chair, that he was alive ("As far as I could tell."), and that he had a plaid shirt on. At the evidentiary hearing, Stroud stated there was no question in his mind that the man sitting behind the counter was wearing a plaid shirt.

When Stroud arrived at the Sheriff's Office on December 27th to work the 3 – 11 shift, he learned of the murder at the fireworks stand. Stroud prepared a hand written offense report because he thought what he had seen was important. "I would probably have turned it straight into C.I.D., Criminal Investigation Division." Stroud did not recall ever being talked to about his report after the 27th. He was confident in the accuracy of his report. On cross-examination, Stroud denied telling Deputy Woodhull that he was unsure if he had seen the man behind the counter on his trip to Troup, or on his return

trip. On re-direct, Stroud emphasized his certainty that the man behind the counter was wearing a plaid shirt. He also explained that he mentioned the plaid shirt to applicant's counsel without prompting.[2]

The testimony at the evidentiary hearing established that neither Deputy Woodhull, nor anyone else in the Sheriff's Office, informed the prosecutors of Stroud's report. Jim Walker served as an Assistant District Attorney in Smith County until the month prior to the beginning of applicant's trial. Walker participated directly in the investigation of the murder of Wills. Walker did not recall being given, or seeing, Stroud's statement at any time. If he had been made aware of it, Walker testified that he would have turned over a copy of it to applicant's trial counsel.[3] Jim Patterson succeeded Jim Walker as an Assistant District Attorney in Smith County. Patterson testified the first time that he saw Stroud's written statement was at the habeas evidentiary hearing. Patterson also testified that if he had seen it before the trial, he "probably would've given it to applicant's trial counsel."

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[2] The matter of Stroud remembering the plaid shirt becomes more important in light of the trial court's finding at the evidentiary hearing that Stroud's veracity was dubious because Stroud failed to mention the plaid shirt in his written report on the 27th.

[3] Instead, when the trial court considered applicant's motion for discovery prior to his 1981 trial, Walker informed the trial court "the state is unaware of any . . . exculpatory evidence at this time." At the evidentiary hearing, Walker explained that he never would have made that statement if he had known of the existence of Stroud's statement.

We conclude that the statements of East and Stroud were not disclosed by the Smith County Sheriff's Office either to the prosecutors or to the defense counsel in applicant's case. From the testimony of Frank Henderson, Smith County Assistant District Attorney at the time of the evidentiary hearing, it appears that these statements were discovered for the first time by the District Attorney's Office when the trial court ordered him to examine the Sheriff's Office case files to search for exculpatory evidence. We find these statements were concealed by agents of the State, specifically, members of the Sheriff's Office, from the attorneys on both sides at applicant's 1981 trial. We must next resolve whether these statements were exculpatory and material.

This Court's recent decision in *Thomas v. State, 841 S.W.2d 399 (1992)* controls resolution of this matter. This Court relies upon a three part test to determine whether the State violated applicant's rights to due process under the Fourteenth Amendment:

1) Has there been a failure to disclose evidence?; (2) Is that evidence favorable to the accused?; and (3) Does that evidence create a probability sufficient to undermine the confidence in the outcome of the proceeding?

Thomas v. State, slip op., at 8. As our opinion above reflects, we have held that the State, through its agent, the Smith County Sheriff's Office, failed to disclose to defense counsel the statements and reports of Ralph East and Kelly Stroud.

The issue of favorability is controlled by deciding whether the evidence "if disclosed and used effectively, . . . may make the difference between conviction

and acquittal." *Thomas v. State, supra;* and *United States v. Bagley, 473 U.S. 667, at 676, 105 S.Ct. 3375, at 3380, 87 L.Ed.2d 481 (1985).* Either exculpatory evidence or impeachment testimony can be favorable. The evidence provided by East and Stroud serves both purposes.

The evidence of East and Stroud is exculpatory because it "tends to . . . clear the defendant from alleged fault or guilt." Thomas v. State, slip op. at 8; and Black's Law Dictionary, p. 566 (5th ed. 1990). In the instant case, the only evidence which tied applicant to the commission of the murder at 9:00 p.m. was the testimony of the accomplices. This time was critically important to the State's case, since the evidence adduced by the State at trial proved that applicant was at the Savoy Club and Alfredia Motel ingesting drugs and whoring from 10:00 p.m. on through the rest of the night. However, the evidence from East and Stroud gave a strong indication that the victim may well have been alive from 10:00 p.m. until 1:00 a.m. The attorneys who prosecuted applicant in the instant case reached the same conclusion.

Jim Walker testified at the evidentiary hearing:

"I think it is exculpatory. . . . I mean, as a prosecutor, if you have two witnesses that say a murder took place at 9:00 O'Clock at night but there is another witness that says it didn't happen until 1:00 O'Clock, that's exculpatory. It doesn't mean that all of them are being truthful or being correct. . . . It just means it's exculpatory and should be disclosed."

Walker also explained that his evidence showed applicant was at the Alfreda Motel doing heroin through the rest of the night and into the next morning. Walker believed that

Stroud's evidence showed "the man was alive at a time when applicant was laid up in a hotel doing heroin."

Jim Patterson reached the same conclusion as Walker. In light of the specific testimony of applicant's accomplices, Patterson believed the evidence of East and Stroud was exculpatory from his perspective as a prosecutor. Patterson testified that if he had seen the written report of Stroud, he would have wanted to talk to Stroud because, "in view of the information that I had, it didn't make any sense."

We hold that the evidence of East and Stroud was exculpatory and that, in this sense, it was favorable to applicant. We also hold that this evidence qualified as impeachment evidence.

The testimony of East and Stroud would have impeached the testimony of the accomplices on the critical element of when applicant allegedly killed the victim. The above recitation of the evidence in the instant case supports this conclusion. The evidence of East and Stroud would have been favorable to applicant as impeachment evidence.

Lastly, we must resolve whether the evidence of East and Stroud created a probability sufficient to undermine the confidence in the outcome of the proceeding. In other words, was the evidence of East and Stroud material? Thomas v. State, slip op. at 9. In our effort to answer this question, we examined the evidence of East and Stroud in the context of the overall strength of the State's case. *Thomas v. State, Id; United States v. Bagley, 473 U.S., at 683,*

105 S.Ct., at 3384; and *United States v. Agurs,* 427 U.S.97, at 113, 96 S.Ct.2392, at 2402, *49 L. Ed. 2d 342 (1976).*

If a verdict is only weakly supported by the record, it is more likely to be affected by the non-disclosure of favorable evidence, such as that of East and Stroud, than if it was strongly supported. *Thomas v. State,* slip op. at 9. In the instant case, the only evidence which established that applicant shot and killed the victim prior to the time he went to the Savoy Club and Alfredia Motel was the testimony of his accomplices.[4]

Texas statutory law historically casts accomplice witness testimony in an especially suspect light, in that it requires it to be corroborated by "other evidence tending to connect the defendant with the offense committed." TEX.CODE CRIM.PROC.ANN.art. 38.14 (1966); and *Cast v. State, 164 Tex. Crim. 3, 296 S.W.2d 269, at 271*

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[4] It is conceivable that evidence could have been presented by the State to corroborate the time of the victim's death. However, the actions of the investigators for the Smith County Sheriff's Office prevented the development of this evidence.

The medical examiner for Smith County, Dr. Gonzalez, performed an autopsy on the victim at 2:30 p.m. on the afternoon of the 27th, the day after the victim was allegedly shot. At trial, he testified that the victim was killed within 24 hours of the time he conducted the autopsy.

At the evidentiary hearing, Dr. Gonzalez testified that there are more tests that he could have performed on the victim to determine a more precise time of death. However, he did not perform those tests. He explained that he did not fix a more precise time of death because he was not requested to do so by the representative of the Smith County Sheriff's Office who was present at the autopsy.

(Tex.Cr.App. 1956) ("An accomplice witness is a discredited witness."). In the instant case, the corroboration offered by the State tended to connect applicant to the commission of the crime, but did so without corroborating the time that the accomplices said applicant shot and killed the victim. We conclude that the instant verdict, in light of the evidentiary support on the issue of the time applicant allegedly shot the victim, was likely to be affected by the non-disclosure of the exculpatory and impeaching evidence of East and Stroud.

In determining materiality, we also considered the potentially adverse affect that non-disclosure of East and Stroud's evidence had on the defense counsel's preparation and presentation of applicant's case. *Thomas v. State,* slip op. at 9. As previously noted, East and Stroud's evidence was exculpatory. Both of the Assistant District Attorneys who prosecuted the instant case concluded they would have disclosed this evidence to defense counsel if they had been aware of it. We hold that it was highly probable that the failure to disclose this evidence to defense counsel, as a result of the Sheriff's Office investigator's suppression of it, hampered defense counsel's efforts to prepare a defense which would have created a reasonable doubt that applicant could have been at the fireworks stand at the time the accomplices testified that the murder was committed.

Also, as previously noted, Stroud and East's evidence would have impeached the inherently suspect testimony of the accomplices. If it had been disclosed to defense counsel, he could have used it to controvert and impeach the accomplice's testimony. *Thomas v. State,* slip op. at 11.

In this context, the failure to disclose the evidence hindered defense counsel's presentation of his case to the jury.

Because defense counsel's preparation and presentation of his case was adversely affected by the non-disclosure of East and Stroud's evidence, and because the verdict in the instant case was weakly supported on the issue of who killed the victim, and when that killing occurred, we hold that the failure to disclose this favorable evidence created a probability sufficient to undermine the confidence in the outcome of the instant trial. *Thomas v. State*, slip op. at 13. Applicant's right to due process, by virtue of the Due Process Clause of the Fourteenth Amendment, was violated by the non-disclosure of this evidence. Applicant's 115th allegation is sustained.[5]

The judgment of the trial court is vacated and the applicant is remanded to the custody of the Smith County Sheriff to answer the indictment.

WHITE, Judge

(Delivered February 10, 1993)

En Banc

MALONEY, J., not participating.

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[5] Because we have granted applicant relief based upon the deprivation of his right to due process, there is no need to answer his allegation that the failure to disclose the evidence of East and Stroud deprived him of effective assistance of counsel.

APPENDIX D

ORDER DENYING MOTION FOR REHEARING COURT OF CRIMINAL APPEALS OF TEXAS [1998]

EX PARTE ANDREW LEE MITCHELL,
THE STATE OF TEXAS

NO. 1493-96

COURT OF CRIMINAL APPEALS OF TEXAS

1998 Tex. Crim. App. LEXIS 50

April 15, 1998, Delivered

PRIOR HISTORY: Applicant Petition for Discretionary Review from the TWELFTH Court of Appeals [SMITH County].

COUNSEL: Attorney for Plaintiff: David L. Botsford, Austin, Tx.

Attorney for Defendant: Edward J. Marty, Assistant District Attorney, Tyler, Tx.

Jeffrey L. Van Horn, Assistant State's Attorney, Austin, Tx.

JUDGES: BAIRD, Judge

OPINION: Original Opinion of November 19, 1997, Reported at: 1997 Tex. Crim. App. LEXIS 92

CONCUR BY: Price

CONCUR: CONCURRING OPINION TO DENIAL OF APPLICANT'S MOTION FOR REHEARING

I concur with the denial of applicant's motion for rehearing. According to our "hand down" sheet, this Court granted all six of applicant's grounds for review.

However, a review of our voting record indicates that a majority of this Court agreed to grant review on only the two grounds addressed in the opinion; the implication in the "hand down" sheet to the contrary was due to a clerical error. Therefore, we need not address applicant's other grounds for review.

Price, Judge

Delivered: April 15, 1998

DISSENT BY: BAIRD

DISSENT:

DISSENTING OPINION TO DENIAL OF APPLICANT'S MOTION FOR REHEARING

Our summary denial of applicant's motion for rehearing wholly ignores the fact that our opinion on original submission failed to address four grounds for review which we agreed to consider.

On original submission, the majority stated we granted only two grounds for review. *Ex Parte Mitchell*, ___ S.W.2d ___, ___; 1997 Tex. Crim. App. LEXIS 92 *2 (Tex.Cr.App. No. 1493-96, delivered Nov. 19, 1997). And the concurring opinion states we granted review on only grounds one and two. *Id.*, at 1997 Tex. Crim. App. LEXIS 92, *20-23, n. 1 & 2, (Meyers, J., concurring). However, the records of the clerk of this Court indicate applicant's petition for discretionary review which raised six grounds for review was granted without limitation on January 29, 1997. The case "shuck" indicates that all grounds for review were granted. Additionally, the parties briefed all six grounds for review.

When a motion for rehearing informs us that we failed to resolve grounds for review that we agreed to consider, we should not dismiss the motion. Instead, we should either address those grounds, explain why they need not be addressed, or dismiss them as improvidently granted.

Because the majority fails to do so, I dissent to the denial of appellant's motion for rehearing.

BAIRD, Judge

(Delivered: April 15, 1998)

En Banc